And of [illegible] AND 01/100 Dollars, Premium,

Does Insure JOHN CLAY hereinafter called the Assured,

Whose address is 1250 LAKE SHORE DRIVE, CHICAGO, ILLINOIS

from the 22nd day of APRIL 19 52, at noon, to the 22nd day of APRIL 19 55, at noon, Standard Time at place of issuance, to an amount not exceeding

[illegible] Dollars,

on the following described property:

PROPERTY COVERED

1. Personal property owned, used or worn by the person in whose name this Policy is issued and members of the Assured's family of the same household, while in all situations, except as hereinafter provided.

PERILS INSURED

2. All risks of loss of or damage to property covered except as hereinafter provided.

AMOUNTS OF INSURANCE

3. Insurance attaches only with respect to those items in this paragraph for which an amount is shown and only for such amount.

ITEMS	AMOUNT	
(a)	$ 32,000.00	On unscheduled personal property, except as hereinafter provided.
(b)	$ 22,350.00	On personal jewelry, watches, furs, fine arts and other property as per schedules attached hereto. Each item considered separately insured.
(c)	$ NIL	On unscheduled personal jewelry, watches and furs in addition to the amount of $250. provided in paragraph 5(b), against fire and lightning only.
TOTAL	$ 54,350.00	

(See Other Side for Paragraphs 4, 5 and 6)

DECLARATIONS OF THE ASSURED

7. The following are the approximate values of the unscheduled personal property, other than jewelry, watches and furs, as estimated by the Assured, at the time of issuance of this Policy:

	Wherever Located	(Of which the following amounts involve personal property ordinarily situated throughout the year at residences other than principal residence.)
(a) Silverware and pewter	$ 2,200.00	($ 40.00)
(b) Linens (including dining room and bedroom)	$ 1,500.00	($ 50.00)
(c) Clothing (Men's, Women's, Children's)	$ 6,000.00	($ 150.00)
(d) Rugs (including floor coverings) and draperies	$ 2,250.00	($ NIL)
(e) Books	$ 100.00	($ NIL)
(f) Musical Instruments (including pianos)	$ 1,500.00	($ NIL)
(g) Television sets, radios, record players and records	$ 650.00	($ NIL)
(h) Paintings, etchings, pictures and other objects of art	$ 1,500.00	($ 50.00)
(i) China and glassware (including bric-a-brac)	$ 2,000.00	($ 50.00)
(j) Cameras and Photographic equipment	$ 650.00	($ NIL)
(k) Golf, hunting, fishing and other sports and hobby equipment	$ 1,100.00	($ NIL)
(l) Refrigerators, washing machines, stoves, electrical appliances and other kitchen equipment	$ 570.00	($ 30.00)
(m) Bedding (including blankets, comforters, covers, pillows, mattresses, and springs)	$ 1,500.00	($ 200.00)
(n) Furniture (including tables, chairs, sofas, desks, beds, chests, lamps, mirrors, clocks)	$11,000.00	($1,500.00)
(o) All other personal property (including wines, liquors, foodstuff, garden and lawn tools and equipment, trunks, traveling bags, children's playthings, miscellaneous articles in basement and attic) and professional equipment, if any, covered under paragraph 6(b)	$ 2,950.00	($ 100.00)
TOTAL	$36,600.00	($2,170.00)

NOTE: If the total value ordinarily situated throughout the year at residences other than the principal residence exceeds ten per cent of the amount of the insurance granted under Item (a) Paragraph 3, such excess value is not insured hereunder unless specifically endorsed hereon.

Countersigned this 22nd day of APRIL 1952 at CHICAGO, ILLINOIS

BARTHOLOMAY & CLARKSON, General Agent

By John L. Clarkson

Form 630-I - 1100 9 50 82776 - Printed in U.S.A.

[fol. 3a]

EXHIBIT A TO COMPLAINT

3

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 470

JOHN CLAY, PETITIONER,

vs.

SUN INSURANCE OFFICE, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1963
CERTIORARI GRANTED DECEMBER 2, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 470

JOHN CLAY, PETITIONER,

vs.

SUN INSURANCE OFFICE, LIMITED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

JOHN CLAY, Plaintiff,

vs.

SUN INSURANCE OFFICE LIMITED, a corporation organized under the laws of Great Britain, authorized to transact business in Florida.

COMPLAINT—Filed May 20, 1957

(1) Plaintiff is a citizen of the state of Florida residing at 1614 Brickel Drive, Fort Lauderdale and defendant is a corporation incorporated under the laws of the United Kingdom of Great Britain, but authorized to transact business in the State of Florida. The matter in controversy exceeds, exclusive of interest and cost, the sum of $3,000.00.

(2) On April 22, 1952, defendant for a premium of $966.01 paid by plaintiff executed and delivered to plaintiff its Personal Property Floater Policy insuring the plaintiff against theft and destruction of his property, said policy being No. 7 P.P. F. 117120, a copy of which is attached as Exhibit A, whereby defendant agreed to insure plaintiff for the term of 3 years beginning from the 22nd day of April, 1952 until the 22nd day of April, 1955, at noon, standard time. The policy insured against loss or damages the personal property stolen from the plaintiff, wherever located.

(3) While such contract of insurance was in full force and effect and on or about January 1, 1955 and while the plaintiff was living at J-C Ranch in Palm Beach County near Lake Harbor, Florida, plaintiff was robbed of certain personal property consisting of silverware, mens clothing, books and hunting equipment having a value of $9,000.00 and a painting of 4 generations of the Clay family, of a value of approximately $3,500.00 was slashed and partially

[fol. 3] destroyed, said painting being insured under the terms of the above-referred-to policy.

(4) Plaintiff has duly performed all the conditions of such policy on his part.

(5) Plaintiff duly notified the defendant of the robbery and loss sustained by the plaintiff thereby, and of the damages of the said painting and within the time specified in the policy of insurance caused to be served upon the defendant at the office of its agent, Bartholomay & Clarkson, 175 West Jackson Boulevard, Chicago 4, Illinois, due and proper proofs of loss which were duly received and retained by the defendant.

(6) Defendant has failed and refused to pay any part of this loss of $13,500.00 to plaintiff.

Wherefore, plaintiff demands judgment against defendant for the sum of $13,500.00, interest and cost. Plaintiff demands trial by jury.

Gibson & Gibson, By Paschal C. Reese, Attorneys for the Plaintiff, 209 South Olive Avenue, West Palm Beach, Florida.

Duly sworn to by Paschal C. Reese, jurat omitted in printing.

ILLINOIS

PERSONAL PROPERTY FLOATER POLICY
(World Wide)

Policy No. 7 P.P.F. 117120

FOUNDED A. D. 1710

Sun Insurance Office
LIMITED

WM. H. McGEE & CO., INC.
MANAGERS MARINE DEPARTMENT
111 JOHN STREET, NEW YORK 7, N. Y.
BARTHOLOMAY & CLARKSON, General Agent
175 West Jackson Boulevard, Chicago 4, Ill.

556.60
120.00 DED. Cr.
436.60 3(a)
522.41 3(b)

AMOUNT $ 54,350.00 Rate _____ Premium $ 966.01

~~The building(s) in which the Assured resides, located at _____ is or are of _____ construction and the policy charged for this Policy is predicated upon such construction.~~

In consideration of the stipulations herein named

And of ---NINE HUNDRED SIXTY SIX AND 01/100--- Dollars, Premium,
Does Insure JOHN CLAY hereinafter called the Assured,
Whose address is 1250 LAKE SHORE DRIVE, CHICAGO, ILLINOIS
from the 22nd day of APRIL 1952, at noon, to the 22nd day of APRIL 1955,
at noon, Standard Time at place of issuance, to an amount not exceeding
---FIFTY FOUR THOUSAND THREE HUNDRED FIFTY AND NO/100--- Dollars,
on the following described property:

PROPERTY COVERED

1. Personal property owned, used or worn by the person in whose name this Policy is issued and members of the Assured's family of the same household, while in all situations, except as hereinafter provided.

PERILS INSURED

2. All risks of loss of or damage to property covered except as hereinafter provided.

AMOUNTS OF INSURANCE

3. Insurance attaches only with respect to those items in this paragraph for which an amount is shown and only for such amount.

ITEM	AMOUNT	
(a)	$ 32,000.00	On unscheduled personal property, except as hereinafter provided.
(b)	$ 22,350.00	On personal jewelry, watches, furs, fine arts and other property as per schedules attached hereto. Each item considered separately insured.
(c)	$ NIL	On unscheduled personal jewelry, watches and furs in addition to the amount of $250. provided in paragraph 5(b), against fire and lightning only.
TOTAL	$ 54,350.00	

(See Other Side for Paragraphs 4, 5 and 6)

DECLARATIONS OF THE ASSURED

7. The following are the approximate values of the unscheduled personal property, other than jewelry, watches and furs, as estimated by the Assured, at the time of issuance of this Policy:

(Of which the following amounts involve personal property ordinarily situated throughout the

[fo]

EXTENSIONS

4 (a) Subject otherwise to all of the conditions of this Policy, Item (a) Paragraph 3, includes, at the sole option of the Assured, personal property of others while on the premises of the residences of the Assured, and personal property of servants while they are actually engaged in the service of the Assured and while in the physical custody of such servants outside such residences;

(b) The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured;

but in no event shall the Company's combined liability for loss or damage covered under this Paragraph 4 and for insurance attaching under Item (a) Paragraph 3, exceed the amount of insurance shown in Item (a) Paragraph 3.

(c) Automatic Reinstatement of Losses. The following clause shall apply to unscheduled personal property covered hereunder: It is understood that the amount of insurance hereunder shall be reduced by the amount of any loss covered by this Policy, but the Company and the Assured shall be deemed to have agreed that the full amount insured be reinstated automatically in the event of loss and that a pro rata additional premium is payable from the date of the loss, if the entire amount of the loss exceeds $250.00.

LIMITATIONS

5 (a) As respects unscheduled personal property ordinarily situated throughout the year at residences other than the principal residence of the Assured, the Company shall not be liable in excess of ten per cent of the amount of insurance set forth in Item (a) Paragraph 3.

(b) As respects any one loss of unscheduled jewelry, watches and furs, the Company shall not be liable for more than $250.00 unless the loss is covered under Item (c) Paragraph 3, in which event the Company's liability for such loss is limited to the amount stated therein.

(c) As respects any one loss of money including numismatic property, the Company shall not be liable for more than $100. As respects any one loss of notes, securities, stamps including philatelic property, accounts, bills, deeds, evidences of debt, letters of credit, passports, documents and railroad and other tickets, the Company shall not be liable for more than $500.

EXCLUSIONS

6. This Policy does not insure

(a) animals; automobiles, motorcycles, aircraft, boats or other conveyances (except bicycles, tricycles, baby carriages, invalid chairs and similar conveniences), or their equipment or furnishings except when removed therefrom and actually on the premises of residences of the Assured; property of any Government or subdivision thereof;

(b) unscheduled property pertaining to a business, profession or occupation of the persons whose property is insured hereunder, excepting professional books, instruments and other professional equipment owned by the Assured while actually within the residences of the Assured;

(c) against breakage of eye glasses, glassware, statuary, marbles, bric-a-brac, porcelains and similar fragile articles (jewelry, watches, bronzes, cameras and photographic lenses excepted), unless occasioned by theft or attempt thereat, vandalism or malicious mischief, or by fire, lightning, windstorm, earthquake, flood, explosion, falling aircraft, rioters, strikers, collapse of building, accident to conveyance or other similar casualty, nor unless likewise occasioned, against marring or scratching of any property not specifically scheduled herein;

(d) against mechanical breakdown; against loss or damage to electrical apparatus caused by electricity other than lightning unless fire ensues and then only for loss or damage by such ensuing fire;

(e) against wear and tear; against loss or damage caused by dampness of atmosphere or extremes of temperature unless such loss or damage is directly caused by rain, snow, sleet, hail, bursting of pipes or apparatus; against deterioration, moth, vermin and inherent vice; against damage to property (watches, jewelry and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process;

(f) property on exhibition at Fairgrounds or on the premises of any National or International Exposition unless such premises are specifically herein described;

(g) against loss or damage caused by or resulting from:

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or Customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

7. DECLARATIONS OF THE ASSURED (See Face)

8. Unless otherwise endorsed hereon, no other insurance against the risks hereby insured is permitted on the property covered hereunder except as to property described under Paragraphs 4(a) and (b), 5(b) and (c), 6 (a) and (b). If at the time of loss or damage, there is any other valid and collectible insurance which would attach on the property described in Paragraphs

[fol. 3b]

(b) unscheduled property pertaining to a business, profession or occupation of the persons whose property is insured hereunder, excepting professional books, instruments and other professional equipment owned by the Assured while actually within the residences of the Assured;

(c) against breakage of eye glasses, glassware, statuary, marbles, bric-a-brac, porcelains and similar fragile articles (jewelry, watches, bronzes, cameras and photographic lenses excepted), unless occasioned by theft or attempt thereat, vandalism or malicious mischief, or by fire, lightning, windstorm, earthquake, flood, explosion, falling aircraft, rioters, strikers, collapse of building, accident to conveyance or other similar casualty, nor unless likewise occasioned, against marring or scratching of any property not specifically scheduled herein;

(d) against mechanical breakdown; against loss or damage to electrical apparatus caused by electricity other than lightning unless fire ensues and then only for loss or damage by such ensuing fire;

(e) against wear and tear; against loss or damage caused by dampness of atmosphere or extremes of temperature unless such loss or damage is directly caused by rain, snow, sleet, hail, bursting of pipes or apparatus; against deterioration, moth, vermin and inherent vice; against damage to property (watches, jewelry and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process;

(f) property on exhibition at Fairgrounds or on the premises of any National or International Exposition unless such premises are specifically herein described;

(g) against loss or damage caused by or resulting from:

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or Customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

7. DECLARATIONS OF THE ASSURED (See Face)

8. Unless otherwise endorsed hereon, no other insurance against the risks hereby insured is permitted on the property covered hereunder except as to property described under Paragraphs 4(a) and (b), 5(b) and (c), 6 (a) and (b). If at the time of loss or damage, there is any other valid and collectible insurance which would attach on the property described in Paragraphs 4(a) and (b), 5(b) and (c), 6(a) and (b) had this Policy not been effected, then this insurance shall apply only as excess insurance over all such other insurance and in no event as contributing insurance.

[fol. 3b]

GENERAL CONDITIONS

Valuation Clause:—This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost to repair or replace the same with material of like kind and quality.

It is understood and agreed that, in the event of loss of or damage to any article or articles which are a part of a set, the measure of loss or damage to such article or articles shall be a reasonable and fair proportion of the total value of the set, giving consideration to the importance of said article or articles; but in no event shall such loss or damage be construed to mean total loss of set.

In case of loss or injury to any part of the insured property consisting, when complete for sale or use, of several parts, this Company shall only be liable for the insured value of the part lost or damaged.

Appraisal Clause:—If the Assured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the Assured or the Company, such umpire shall be selected by a judge of a court of record in the state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The Assured and the Company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Company shall not be held to have waived any of its rights by any act relating to appraisal.

Bailee Clause:—This insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

Notice of Loss Clause:—The Assured shall as soon as practicable report to this Company or its agent every loss or damage which may become a claim under this Policy and shall also file with the Company or its agent within ninety (90) days from date of loss a detailed sworn proof of loss. Failure by the Assured to report the said loss or damage and to file such sworn proof of loss as hereinbefore provided shall invalidate any claim under this Policy for such loss.

Sue and Labor Clause:—In case of loss or damage, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof without prejudice to this insurance; nor shall the acts of the Assured or this Company, in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment; to the charge whereof this Company will contribute according to the rate and quantity of the sum herein insured.

3a

Examination Under Oath Clause:—The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company, relative to any and all matters in connection with a claim and subscribe the same; and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

Misrepresentation and Fraud Clause:—This Policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Payment of Loss Clause:—All adjusted claims shall be paid or made good to the Assured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at the office of this Company.

No loss shall be paid hereunder if the Assured has collected the same from others.

Subrogation Clause:—In the event of any payment under this Policy the Company shall be subrogated to all the Assured's rights of recovery therefor against any person or organization and the Assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Assured shall do nothing after loss to prejudice such rights.

Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein.

Cancelation Clause:—This Policy may be canceled by the Assured by mailing to the Company written notice stating when thereafter such cancelation shall be effective. This Policy may be canceled by the Company by mailing to the Assured at the address shown in this Policy or last known address written notice stating when not less than five (5) days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Assured or by the Company shall be equivalent to mailing.

If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

Schedules and Endorsements
To Be Attached Here

BARTHOLOMAY & CLARKSON AGENT

IM 2223
(Ed. 12-27-45)

PERSONAL PROPERTY INSURANCE
($25.00 or $15.00 Deductible Clause)

Attached to and forming part of Policy Number 7 F 7160 issued to JOHN CLAY

by JON INSURANCE OFFICE, INC. at its Agency

located (city and state) CHICAGO, ILLINOIS Date of Endorsement DEC. 1, 1955

Each claim for loss or damage (separately occurring) to unscheduled property shall be adjusted separately and from the amount of each such adjusted claim or the applicable limit of liability, whichever is less, the sum of $25.00 (INSERT $25.00 OR $15.00) shall be deducted. Such deductible shall not apply, however, to loss or damage by fire, lightning, windstorm, cyclone, tornado, hail, explosion, riot, riot attending strike, smoke, damage by vehicles or aircraft, burglary or hold-up.

"Burglary" as used in this endorsement means the felonious abstraction of the insured property from within a building or room by any person or persons making felonious entry therein by actual force and violence of which there shall be visible marks made upon the exterior of such premises at the place of such entry by tools, explosives, electricity or chemicals.

All other terms and conditions of this policy remain unchanged. BARTHOLOMAY & CLARKSON, AGENT Agent.

By John L. Clarkson

AUTHENTICATED

[fol. 3c]

of 1%. The Company shall be equivalent to filing.

If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

Schedules and Endorsements
To Be Attached Here

BARTHOLOMAY & CLARKSON AGENT

BM 2223
(Ed. 12-27-45)

PERSONAL PROPERTY INSURANCE
($25.00 or $15.00 Deductible Clause)

Attached to and forming part of Policy Number 7-F-7150 issued to
JOHN CAY
by JOHN INSURANCE OFFICE, Inc. at its Agency
located (city and state) CHICAGO, ILLINOIS Date of Endorsement April 22nd 1952

Each claim for loss or damage (separately occurring) to unscheduled property shall be adjusted separately and from the amount of each such adjusted claim or the applicable limit of liability, whichever is less, the sum of 25.00 (INSERT $25.00 OR $15.00) shall be deducted. Such deductible shall not apply, however, to loss or damage by fire, lightning, windstorm, cyclone, tornado, hail, explosion, riot, riot attending strike, smoke, damage by vehicles or aircraft, burglary or hold-up.

"Burglary" as used in this endorsement means the felonious abstraction of the insured property from within a building or room by any person or persons making felonious entry therein by actual force and violence of which there shall be visible marks made upon the exterior of such premises at the place of such entry by tools, explosives, electricity or chemicals.

All other terms and conditions of this policy remain unchanged.

BARTHOLOMAY & CLARKSON, AGENT
Agent.
By John L. Clarkson

AUTHENTICATED

[fol. 3c]

This Policy is made and accepted subject to the foregoing stipulations and conditions which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provisions or conditions of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

Provisions required by law to be stated in this Policy:—This Policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents, but this Policy shall not be valid unless countersigned on the declarations page by Wm. H. McGEE & CO., Inc., or a duly authorized agent of this Company.

Wm. H. McGEE & CO., Inc., Managers Marine Department

H. Clarkson PRESIDENT

22nd APRIL 52 CHICAGO, ILLINOIS

5

In Event of Loss or Damage

Immediately notify the Agent who issued this policy, or the nearest office of this Company listed below:

Wm. H Gee & Co., Inc.
MANAG MARINE DEPARTMENT
111 JOHN S T, NEW YORK 7, N. Y.

BALTIMORE 2:
Jarrett Building, South & Redwood Sts.

BOSTON 9:
14 State Street

CHICAGO 4:
175 West Jackson Boulevard

COLUMBUS 15, O.:
101 High-Long Building, 5. E. Long St.

DALLAS 1:
Gilbert Easley, Correspondent,
112 National City Building

HOUSTON 2:
Chas D. Bailey, Correspondent,
We Building

LOS ANGELES 13:
548 s. Spring Street

NEW ORLEANS 12:
111 Tulane Avenue

PHILADELPHIA 6:
Pulc Ledger Building

SAN FRNCISCO 4:
30 California Street

SEATTL 4:
14(Dexter Horton Building,
Second & Cherry Sts.

TAMPA
405 Tallace S Annex

ILLINOIS

Policy No. 7 P.P.F. 117120

ASSURED JOHN CLAY

FROM APRIL 22, 1952

TO APRIL 22, 1955

PERSONAL PROPERTY FLOATER POLICY

Sun Insurance Office
LIMITED

FOUNDED A.D. 1710

WM. H. McGEE & CO., INC.
MANAGERS MARINE DEPARTMENT
111 JOHN STREET, NEW YORK 7, N. Y.

BARTHOLOMAY & CLARKSON
General Agents
175 West Jackson Boulevard
Chicago 4, Ill.
Tel. Wabash 0163

FINE ARTS RIDER NO. 1

(One Location)

Attached to and forming part of Policy Number 7rrr117120 issued to

JOHN CRAY

by SUN INSURANCE OFFICES, LTD. of its Agency

located (city and state) CHICAGO, ILLINOIS Date of Endorsement APRIL 22, 1952

This insurance covers the property insured hereunder while on exhibition or otherwise

(a) at 1250 LAKE SHORE DRIVE, CHICAGO, ILLINOIS, and

(b) elsewhere within the limits of the Continental United States and Canada (excluding the premises of fair grounds or of any national or international exposition unless endorsed hereon) for not exceeding 10% of the aggregate amount of the schedule, but in event the amount at risk exceeds 10%, notice shall be given this Company within 72 hours from time of leaving location specified in (a) above and additional premium paid, if required.

All other terms and conditions of this policy remain unchanged.

BARTHOLOMAY & CLARKSON, AGENT

BY John F. Clarkson Agent

AUTHENTICATED

BARTHOLOMAY CLARKSON, AGENT

ITEM NO.	ARTICLE	AMOUNT INSURED
1.	ONE 22" X 35" NUMBER 657 "LAGO MAGGOIRE", THE ITALIAN MODERN 19th CENTURY, BY J. B. PYNE, 1865.	$ 200.00
2.	ONE 22" X 31" "GARDEN AND PATIO", BY V. RICARDO, ITALIAN.	200.00
3.	ONE 16" X 20" LANDSCAPE WITH CATTLE.	50.00
4.	ONE 11" X 14" LANDSCAPE, STREAM THROUGH WOODS.	25.00
5.	ONE WINTER SNOW SCENE WITH THATCH HOUSE	25.00
6.	ONE WINTER IN THE WOODS BY C. HANAH WITH A HAND CARVED FRAME	300.00
		$ 800.00

APP. 11-24-48 BY LEO A. MARZOLO,
1012 N. DEARBORN ST., CHICAGO 10, ILLINOIS

Wm. H. McGEE & CO., Inc.
Form 1316B 20M 4-48 80337 Printed in U.S.A.

[fol. 3e]

ITEM NO.	ARTICLE	AMOUNT INSURED
	FUR SCHEDULE	
1.	ONE ERMINE 3/4 LENGTH CAPE	$ 800.00
2.	ONE PERSIAN LAMB COAT AND HOOD	1,200.00
3.	ONE MINK COAT	2,000.00
4.	ONE SILVER BLUE MINK STOLE	1,000.00
	FUR TOTAL	$5,000.00
	#4 APP. 5-4-50 BY MARSHALL FUR CO., 39 SO. STATE ST., CHICAGO 3, ILLINOIS	
	JEWELRY SCHEDULE	
1.	ONE LADIES' 14K YELLOW GOLD RING, 1 LARGE DIAMOND SET IN PLATINUM BEZEL 6.10 CT., GOOD QUALITY AND 24 ORIENTAL CALIBRE RUBIES SET AROUND DIAMOND IN PEAR SHAPE DESIGN. IN CENTER OF RUBY DESIGN ARE 12 SMALL DIAMONDS ALL GOOD QUALITY	$10,000.00
2.	ONE PAIR OF LARGE LEAF DESIGNED EARRINGS, 14K PINK GOLD AND PLATINUM TRIM FOR DIAMONDS. [illegible] WITH 2 DIAMONDS ABOUT .50 CT., 8 SMALL DIAMONDS AND ORIENTAL RUBIES	350.00
3.	ONE 17J ETERNA WATCH IN 14K WHITE GOLD CASE SET IN CENTER OF 14 KT. YELLOW GOLD 1[illegible]IDE TAPERED TO 1" ON THE BOTTOM BRACELET AND 2 SMA[illegible]IAMONDS SET IN CASE, PLATINUM ORNAMENT SET ON EACH [illegible]DE OF WATCH WITH 1 LARGE DIAMOND WEIGHING ABOUT .3[illegible] CT. [illegible]D 22 SMALLER DIAMONDS, 12 RUBIES ON EACH SIDE OF WATCH. (24 DIAMONDS AND 12 RUBIES)	2,000.00
4.	ONE LADIES DIAMOND RING, PLATINUM HANDMADE MOUNTING SET WITH ONE CENTER TRIANGLE DIAMOND, BLUE WHITE, 3 CTS., AND 2 SIDE MARQUISE DIAMONDS, BLUE WHITE .75 CTS. EACH	4,200.00
	JEWELRY TOTAL	$16,550.00
	#1 APP., 11-26-48, #2 APP. 11-18-48 BY I. L. HELLER, 55 E. WASHINGTON ST., CHICAGO, #3 APP. 2-3-49 BY I. L. HELLER #4 APP. 5-1-52 BY AMERICAN DIAMOND SYNDICATE, BY EDGAR M. ZIMMERMAN, 37 S. WABASH AVE., CHICAGO.	

[fol. 4] IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed June 12, 1957

The Defendant, for answer to the Complaint, says:

1. In answering Paragraph 1, the defendant admits that it is a corporation incorporated under the laws of Great Britain and authorized to do business in Florida, but generally denies the remaining allegations contained therein.

2. In answering Paragraph 2, the defendant admits the issuance of Policy No. 7 P.P.F. 117120, with said effective dates of coverage, and further admits that Exhibit A is a [fol. 5] copy of the original of said policy. In further answering said paragraph, the defendant denies the remaining allegations, but says that the policy sued upon is a Personal Property Floater Policy, commonly referred to as an inland Marine Policy, insuring against all risks of loss or damage.

3. In answering Paragraph 3, the defendant denies the same.

4. In answering Paragraph 4, the defendant denies the same.

5. In answering Paragraph 5, the defendant denies the same.

6. In answering Paragraph 6, the defendant admits the same.

By way of affirmative defenses, the defendant says:

7. By the terms and conditions of the policy of insurance sued upon it says this:

"Suit Clause: No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the assured of the occurrence which gives rise to the claim. Provided, however, that if by the Laws of the state within which this Policy is issued such limitation is in-

valid, then any such claims shall be voided unless such action, suit or proceeding be commenced within the shortest [fol. 6] limit of time permitted by the laws of such state to be fixed herein."

This defendant says that the plaintiff discovered the occurrences which gave rise to the claim during the months of December 1954 and January 1955 or prior thereto. That suit was not commenced until May 20, 1957, which is long after the 12-month limitation provided for in the policy sued upon.

This defendant further says that the policy sued upon was issued in the State of Illinois and is an Illinois contract and all questions of substantive law are to be governed in accordance with the statutes and common law of that state. That in accordance with the Laws of the State of Illinois, the said "Suit Clause" time limit is valid and enforceable.

8. The policy of insurance sued upon covers all risks of loss or damage to the property covered. This defendant says that the damage and loss complained of was not caused by a fortuitous or extraneous circumstances, but said damage and loss was caused by the deliberate act of Tyyne Delomn Clay, then wife of the insured John Clay, with the intent to destroy or dispose of said insured property. That the act of acts of Tyyne Delomn Clay and the subsequent loss or damage caused to the insured property is not covered under an all risk policy.

9. The defendant asserts its deductible provision of the policy sued upon in mitigation of the claimed damages and losses.

Wicker & Smith, 506 Ainsley Building, Miami, Flor-
[fol. 7] ida, by James A. Smith, Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 14] IN UNITED STATES DISTRICT COURT

VERDICT—June 4, 1958

West Palm Beach, Florida, June 4, 1958.

We, the Jury find in favor of the Plaintiff, John Clay, and assess Plaintiffs damages in the sum of $5,100.00, and assess his damages for attorney's fees reasonably incurred in the amount of $1,700.00.

So Say We All.

James M. Hawn, Foreman

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT—June 4, 1958

Upon consideration of the Verdict of the Jury returned herein, it is thereupon,

Considered and Ordered that Final Judgment be and it is hereby entered in the said cause in favor of the Plaintiff, John Clay, and against the Defendant, Sun Insurance Office, Limited in the sum of Fifty-one Hundred Dollars ($5,100.00) together with attorney's fees reasonably incurred in the amount of Seventeen Hundred Dollars ($1,700.00) together with legal interest thereon from the date hereof, and may recover his costs in this case incurred, said costs to be taxed by the Clerk of this Court, and that the said Plaintiff have execution therefore, it is

[fol. 15] Done and Ordered at West Palm Beach, Florida, this 4th day of June A.D. 1958.

Julian A. Blake, Clerk, United States District Court, Southern District of Florida, By Joseph I. Bogart, Deputy Clerk (Seal)

IN THE UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR IN THE ALTERNATIVE FOR A NEW TRIAL—Filed June 12, 1958

Comes Now the defendant, Sun Insurance Office, Limited, and moves the Court to enter a judgment in its favor non obstante veredicto, pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, or in the alternative to grant it a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure, and would show unto this Honorable Court for its aforementioned motion that:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The Court erred in charging the jury as to larceny as same relates to the acts and conduct of the plaintiff's wife under the facts and circumstances and evidence of this case.

5. The Court erred in charging the jury as to larceny in its general application to the facts and circumstances [fol. 16] and evidence of this case.

6. That a verdict should be entered in favor of the defendant, Sun Insurance Office, Limited, on the basis that the insurance contract in this case does not cover losses by the willful, malicious and destructive acts of a member of the named insured's household and an additional insured under the said insurance contract, to wit, the plaintiff's wife, Tyyne Delomn Clay.

7. In construing the twelve-month suit clause contained in the said insurance contract involved in this case, the law to be applied in regard to this said clause is governed by the substantive law of the State of Illinois and not the law of the forum and, therefore, the suit having been brought after the twelve-month period as contained in the said insurance contract, said suit is barred from prosecution by the plaintiff.

Wherefore, the defendant moves this Honorable Court to enter a judgment non obstante veredicto or in the alternative to grant it a new trial.

Wicker & Smith, 506 Ainsley Building, Miami, Florida, by Joe C. Brannen, Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 17] In the United States District Court

Order Denying Post Trial Motions and Setting Supersedeas Amount—July 11, 1958

This cause coming on to be heard on defendant's Motion for Judgment Non Obstante Veredicto or in the Alternative for a New Trial, and after hearing argument of counsel and being fully advised in the premises, it is

Considered, Ordered and Adjudged that said motions be and the same are hereby denied.

Upon oral motion of the defendant for the setting of a supersedeas amount and the parties being in agreement thereto, it is further

Ordered and Adjudged that the supersedeas bond be and the same is hereby set in the amount of $7,500.00.

Done and Ordered this 11th day of July, 1958.

Emett C. Choate, United States District Judge.

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 8, 1958

Notice is hereby given that Sun Insurance Office, Limited, the above captioned defendant, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the Final Judgment entered June 4, 1958.

[fol. 18] Joe C. Brannen, Wicker & Smith, 506 Ainsley Building, Miami, Florida, Attorneys for Appellant, Sun Insurance Office, Limited.

Certificate of Service (omitted in printing).

IN THE UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings—June 4, 1958

West Palm Beach, Florida

The above entitled cause came on for hearing before the Hon. Emett C. Choate, United States District Judge, and a jury duly and regularly empannelled and sworn to try the same in open Court, at West Palm Beach, Florida, on June 4, 1958.

APPEARANCES:

Paschal C. Reese Esq., of the law firm of Gibson & Gibson, appearing on behalf of the Plaintiff.

Joe C. Brannen Esq., of the law firm of Wicker & Smith, appearing on behalf of the Defendant.

Thereupon: JOHN CLAY was called as a witness on his [fol. 19] own behalf, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Reese:

Q. Please state your name.
A. John Clay.

Q. Mr. Clay, are you the plaintiff in this suit?
A. I am.
Q. Where do you live at this time?
A. Fort Lauderdale.
Q. Where did you live in the latter part of 1954 and early in 1955?
A. On my ranch at Lake Harbor, Florida.
Q. What is the name of that ranch?
A. The J. C. Ranch.
Q. Is that in Palm Beach County?
A. Yes.
Q. Did you have certain personal effects in the dwelling house at the Lake Harbor address during the latter part of 1954 and the early part of 1955?
A. Yes, I did.
Q. I hand you an insurance policy and ask you if you recognize that policy?
A. Yes, I do. That is a policy that I insured under.
Q. Did this policy issued by the Sun Insurance office insure the property located in your dwelling?
A. Yes, sir, it does.

[fol. 20] OFFER IN EVIDENCE

Mr. Reese: At this time, your Honor, I would like to offer this in evidence.

The Court: It will be admitted, having been stipulated to at pretrial.

(Thereupon the instrument was marked in evidence as Plaintiff's Exhibit 1.)

The Court: This is the policy stipulated to be the policy sued upon and which was in effect at the time of the alleged loss.

Mr. Reese: That's right.

By Mr. Reese:

Q. Now, Mr. Clay, did any of the personal property covered by that policy in your dwelling house disappear?
A. Yes it did, sir.

. . . . . .

[fol. 34] Q. And all these were taken from your residence?

A. That is correct.

Q. When did these things actually disappear?

A. In December and January of 1954 and 1955.

Q. Mr. Clay, when did you move to the State of Florida?

A. 1952.

Q. Did you buy property in the state?

A. Yes. I bought a ranch at that time.

Q. Is that the ranch where you were living?

A. Yes.

Q. Have you been a resident and citizen of Florida since 1952?

A. I have.

Q. Continuously?

A. Yes, continuously.

* * * * * * *

[fol. 35] Cross examination.

By Mr. Brannen:

Q. Mr. Clay, referring to Plaintiff's Exhibit 1 which is the insurance policy in this case, when was this policy taken out? Is it April 22, 1952?

A. Yes.

Q. And at that time were you a resident of the State of Illinois?

A. I believe so, yes.

Q. What was your address that you gave on the policy as being your residence?

A. 1250 Lake Shore Drive.

Q. And that is in Chicago, Illinois, is it not?

A. Yes.

* * * * * * * *

[fol. 36] Q. Now, you say that you moved down to the State of Florida. That was in 1952; is that correct?

A. That's right.

Q. Do you know approximately what month it was?

A. Around July or August, I believe.

Q. July or August of 1952. Where did you come to in Florida?

A. Palm Beach.

Q. Where did you live, what residence?

A. I was living here. No, I was living on a boat that I had.

Q. You came down in a boat and you lived on the boat; is that right?

A. Yes, we were here in Miami and Fort Lauderdale, just around different places.

Q. In other words, you stayed on your boat and you went from one place to another; is that right?

[fol. 37] A. Yes.

Q. Where was your next residence?

A. At Clewiston.

Q. Where did you live in Clewiston?

A. At the Clewiston Inn.

Q. And after Clewiston where did you go?

A. Out to the ranch.

Q. Was that the J. C. Ranch?

A. Yes.

Q. And all during this time you were living with your wife, Mrs. Clay, is that right?

A. That's right, yes.

Q. Do you know approximately when you moved out to the J. C. Ranch? Let me ask you this first of all. What was the date that you moved out to the ranch?

A. I believe that was about June, somewhere around there of 1954.

Q. 1954?

A. Somewhere around there, yes.

Q. Now, you came down to Florida in 1952. You lived on the boat for awhile, and you lived in Clewiston for awhile, and in June, 1954 you moved out to the ranch. Is that correct?

A. Yes.

Q. And that was the first time you had purchased a residence for yourself in Florida?

[fol. 38] A. That's right.

Q. You hadn't owned a home prior to that time, had you?

A. No.

* * * * * * *

[fol. 39] Q. You have testified on direct examination concerning these losses, and if I understand you correctly, it is your testimony that these losses occurred in November, December and January of 1954. Is that correct?

A. That's right.

Q. That would be November and December of 1954 and January of 1955.

A. Yes.

Q. Now, these particular items, did you miss them all at one time, or did you discover them over that three months period?

A. The tea set and the silver plates disappeared in November. All the rest of the stuff was in December.

Q. All the rest of these items you have listed here were in December, 1954?

A. Except the family pictures was destroyed in—I be-
[fol. 40] lieve that was in December.

Q. In other words, everything but the tea set and the twelve silver plates was either lost or destroyed in December 1954, is that right?

A. That's right.

* * * * * * *

[fol. 43] Q. I am a little bit confused here. If I understand your testimony before, you said that all of these other losses occurred in December, 1954.

A. I am wrong about that.

Q. Now you say that they disappeared in January of 1955. Is it your testimony that all of these other articles, aside from the tea set and twelve service plates, disappeared in January, 1955?

A. Yes, and the family picture. That's right. December was too early because I left the ranch in January.

Q. Now, was the picture cut in December or January?

A. The picture was cut in the last part of December.

* * * * * * *

[fol. 44] Q. Now, when you left to go on this business trip did you have any idea of what was transpiring in your wife's mind?

[fol 45] A. No, I didn't.

Q. She had previously cut the picture, had she not?

A. Yes, but I removed that from the house.

Q. That indicated something to you when she cut the picture, didn't it?

A. Naturally.

Q. Did you start any divorce proceedings at that time?

A. No.

• • • • • • •

[fol. 51] Q. Now, you subsequently went through divorce proceedings with your wife wherein you secured a divorce; is that right?

A. That's right.

• • • • • • •

[fol. 52] By Mr. Brannen:

Q. During the divorce proceedings, did you seek to have the Court require Mrs. Clay to give you back any of these articles listed on the board?

[fol. 53] A. I asked my attorney to try to get—what the Court did about it, I don't know.

Q. You requested your attorney to get the Court to require her to give these articles back?

A. Whether that was allowed or not, I don't know. The record will show it.

Q. Did you, in fact, ever get them back?

A. No, of course not.

• • • • • • •

By Mr. Brannen:

Q. Was there actually any property settlement whereby you were to get certain property and she was to get certain property?

A. Yes.

Q. Do you know of your own knowledge whether or not in that property settlement you requested through the Court Mrs. Clay to return any of these articles to you?

A. I don't know what the attorneys did on the Court [fol. 54] proceedings. I would have to go back to the Court record to find out what was done about that. I can-

not remember just exactly what was done about that, but I know we didn't get the tea set back.

Q. Mr. Clay, do you know the date that you first notified the insurance company of these items that you are claiming?

A. I think that is in the record here. I haven't got the date in my head.

Mr. Brannen: Can we stipulate to that?

Mr. Reese: February 1, 1955.

The Witness: I think that is approximately right. Right after it was done. After we missed the stuff.

[fol. 55] Mr. Brannen: I think, Mr. Reese, you have agreed with me to stipulate that the insurance company investigated this under reservation rights.

Mr. Reese: That's right.

By Mr. Brannen:

Q. Was there anyone living in the house with you and your wife out at the JC ranch?

A. In the house, no.

Q. Was there any out-buildings?

A. Yes.

Q. Were they in the immediate vicinity of the house?

A. Yes.

Q. Who lived in those?

A. The manager and his wife.

Q. Is that your ranch foreman?

A. Ranch foreman.

Q. Are they being called to testify today?

A. Yes.

Mr. Brannen: Mr. Reese, can we stipulate that the company denied liability on April 6, 1955?

Mr. Reese: Yes, I believe that is the date that was set up at the pretrial.

[fol. 56] The Court: That was on the basis that this policy didn't cover this particular claim?

Mr. Brannen: I think that's all I have at the present time, your Honor.

Redirect examination.

By Mr. Reese:

Q. Mr. Clay, when did you actually buy the JC Ranch?
A. 1952.
Q. And you owned the JC Ranch while you were living at the Clewiston Inn?
A. Yes.
Q. And you operated the ranch from the Clowiston Inn?
A. Yes, certainly.
Q. Do you remember the property settlement that was in the final decree of your divorce?
A. Yes, I remember it very well.
Q. Would it have any reference at all to this property here?
A. No.
Q. It referred to property outside of the State of Florida, didn't it?
A. That's true.

[fol. 57] Mr. Brannen: He is slightly leading.
The Court: Yes.
Mr. Reese: Your Honor, I agree it is, but he had implied—
The Court: Go ahead, don't lead him.
Mr. Reese: I don't have any further questions, your Honor.
Mr. Brannen: No further questions.
The Court: Do you know the firm of Bartholomay & Clarkson Insurance Agents?
The Witness: They were the agents that I took my insurance out through.
The Court: Did you have any other insurance with them?
The Witness: I have had, yes. For a number of years I have dealt with them entirely.
The Court: Did you communicate with them after you came to Florida?
[fol. 58] The Witness: Yes.
The Court: 1250 Lake Shore Drive, Chicago, Illinois, what is that?
The Witness: That was my wife's house which was sold when we came down to Florida.

The Court: Sold in 1952?
The Witness: Yes.
Mr. Reese: You may come down.
Mr. Brannen: Just one more question, if I may.
The Court: Yes.

Recross examination.

* * * * * * *

[fol. 59] By Mr. Brannen:

Q. Mr. Clay do you remember having your deposition taken down in Miami?
A. Yes.
Q. And do you remember raising your right hand?
A. That's right.
Q. And being sworn in?
A. That's right.
Q. Let me ask you whether or not you remember being asked these questions and giving these answers—on page 3-A of the Plaintiff's deposition:

[fol. 60] "Q. You live in and considered Illinois as your home at that time?"

And your answer was:

"Yes." The next question is:

"Q. I notice you paid a premium here of $900 and some dollars. Did you pay that in cash to Bartholomey when you got the policy?"

And you answered:

"No, by check."

The next question is:

"I mean you did not make continuous payments on it. You just paid in one lump sum when you got the policy?"

And your answer:

"I presume that I did."

The next questions:

"And the policy was delivered to you there in Chicago by Bartholomay?"

And you answered:

"Yes."

The Witness: I believe that was true, yes.

• • • • • • •

[fol. 106]

IN THE UNITED STATES DISTRICT COURT

STATEMENT OF THE POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL—Filed October 31, 1958

Comes Now the appellant, Stu Insurance Office, Limited, a corporation organized under the laws of Great Britain, authorized to transact business in Florida, and states the points on which the appellant intends to rely on appeal:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The Court erred when it failed to direct a verdict for the defendant-appellant at the close of the plaintiff's case.

[fol. 107] 5. The Court erred when it failed to direct a verdict for the defendant-appellant as a matter of law at the close of the plaintiff's case pursuant to defendant-appellant's motion based upon its defense as contained in paragraph number seven in its answer.

6. The Court erred when it failed to direct a verdict for the defendant-appellant as a matter of law at the close of the plaintiff's case pursuant to defendant-appellant's motion based upon its defense as contained in paragraph number eight in its answer.

7. The Court erred by failing to grant defendant-appellant's motion for judgment non obstante veredicto or in the alternative for a new trial.

Wicker & Smith, 506 Amsley Building, Miami, Florida, By Joe C. Brannen, Attorneys for Appellant.

IN THE UNITED STATES DISTRICT COURT

APPELLANT'S DESIGNATION OF RECORD ON APPEAL—
Filed October 31, 1958

To the Clerk of the United States District Court for the Southern District of Florida, West Palm Beach Division:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the appellant designates the following portions of the record to be contained in the record on appeal in [fol. 108] the above entitled cause to the United States Circuit Court of Appeals for the Fifth Circuit:

1. The complaint and the exhibit attached thereto—Exhibit A.

2. Answer of the defendant.

3. The entire transcript, stenographically reported, of the trial of the captioned matter.

4. Verdict.

5. Final Judgment.

6. Defendant's motion for judgment non obstante veredicto or in the alternative for a new trial.

7. Order denying post trial motions and setting supersedeas amount.

8. Notice of appeal, with date of filing.

9. Motion for extension of time to file transcript of record.

10. Order on motion to extend time to file transcript.

11. This designation.

12. Plaintiff's Exhibit Number One.

13. A concise statement of the points on which the appellant intends to rely on appeal is appended to this designation.

14. Appellant further reserves the right to designate further other portions of the record, proceedings, and evidence to be contained in the record on appeal, if such procedure is deemed necessary by reason of the filing by [fol. 109] appellee of any counter-designation or any objection to this designation.

Dated this 31st day of October, 1958.

Wicker & Smith, 506 Ainsley Building, Miami, Florida, Attorneys for Appellant, By Joe C. Brannen.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 111]

CLERK'S CERTIFICATE (omitted in printing).

[fol. 112]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 11, 1959 (omitted in printing).

[fol. 113]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17525

SUN INSURANCE OFFICE LIMITED, Appellant,

versus

JOHN CLAY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

OPINION—April 8, 1959

Before Rives and Tuttle, Circuit Judges, and Simpson, District Judge.

TUTTLE, Circuit Judge: This is a suit on a personal property floater policy. It was instituted in the United States District Court for the Southern District of Florida by the insured, John Clay. A jury awarded recovery in the total amount of $6,800.00 and judgment was entered accordingly. The insurer appeals, contending the district court erred [fol. 114] in holding that the stipulation in the policy which forbade suit unless it was instituted within twelve months next after discovery of the loss[1] was rendered void and unenforceable by Florida Revised Statute 95.03 (1957), which reads as follows:

"Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations con-

[1] "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

> tained in any contract whatever entered into after May 26, 1913 fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

We agree with appellant's contention as to this defense, and therefore we do not reach its other contentions.

The policy was issued and delivered to appellee on April 22, 1952, in Chicago, Illinois. At that time appellee was a citizen of and resided in the state of Illinois. He paid the premium in a lump sum in Chicago when he received the policy. Subsequently, in July, 1952, appellee moved to [fol. 115] Florida. He purchased a ranch near Lake Harbor, Florida, in July or August of 1952 and became a resident of Florida from that time on. In December, 1954 and January, 1955, while he was living at the ranch near Lake Harbor, certain of his insured personal property was destroyed by vandalism and other insured property was stolen. Appellee notified appellant of his losses on February 1, 1955. After investigating the claim, appellant denied liability on April 6, 1955. Suit was not instituted until May 20, 1957.

Under the terms of the "Suit Clause" this suit was barred because of appellee's failure to institute it within twelve months next after he had discovered the losses. According to the law of Illinois, such a contractual provision was and is valid and enforceable.[2]

This insurance policy was issued and delivered in Illinois to a citizen of that state; and it was paid for by him while he was present and residing in that state. It insured the appellee's personal property which was at that time pre-

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[2] Trichelle v. Sherman & Ellis, Inc., 259 Ill. App. 346; Hartzell v. Maryland Cas. Co., 163 Ill. App. 221; see also Smith-Hurd Ann. St. Ch. 73, §969a(1)(k) (1958); cf. Smith-Hurd Ann. St. Ch. 73 §§837(1)(a), 903(1)(a) (1958).

sumably in the same state. According to the law of Florida, it was therefore an Illinois contract, the validity and interpretation of which would ordinarily be determined by the law of Illinois. *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed, 254 U.S. 665. Since the law of Illinois validates clauses limiting the time within which suit may be brought, this clause presents a good defense to appellee's [fol. 116] suit unless the Florida statute renders it unenforceable in any Florida court.

This presents a question which substantially affects the outcome of this suit, and since federal jurisdiction in this case is based on diversity of citizenship, we must apply the law which the state courts of the forum would apply (*Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487), insofar as the state law does not violate the constitution of the United States. See *Sampson* v. *Channell*, 1 Cir., 110 F. 2d 754, cert. denied, 310 U.S. 650.

The wording of the Florida statute is quite general and broad, and it appears to apply to all contracts, wherever made or performed, which happen to be sued upon in the courts of Florida. However, there are no reported instances where this statute has been applied under circumstances similar to those presented here; and the jurisprudence of Florida gives us reason to believe that the Florida state courts would construe it as being inapplicable under these circumstances.

The following representative decisions demonstrate the Florida courts' tendency, based on their interpretation of the requirements of due process and their recognition of the general common law rules of comity, to refrain from attempting to apply Florida statutes or their own notions of public policy to foreign contracts which are valid where entered into: *Connor* v. *Elliott, supra; Sovereign Camp, Woodmen of the World* v. *Mixon*, 79 Fla. 420, 84 So. 171; *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, [fol. 117] 78 So. 22; *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168, aff'd, 250 U.S. 2.

It is thus quite possible that the Florida state courts would reach the same conclusion that the Kentucky court reached in *Union Cent. Life Ins. Co.* v. *Barnes*, 175 Ky.

364, 194 S.W. 339[3]—that the validity of a contractual provision limiting the time within which suit can be brought is to be determined by the lex locus contractu rather than the lex fori. This result could be expected if the court did not fall into the Alabama Supreme Court's error[4] of assuming that the issue presented concerned the choice of the applicable statute of limitations rather than the choice of the substantive law governing the validity of the contract itself.[5]

We are not obliged, however, to make the difficult guess as to what the Florida state courts might decide if they were presented with this issue, for we conclude that there is only one possible decision which would be consonant with due process of law:[6] to deny application of the Florida statute to this contract.

Examining the decisions of the Supreme Court of the United States on this subject, we find none which involves [fol. 118] the identical circumstances presented here, but we find several which present very similar facts and which, we feel, clearly and unmistakably point out the result which must be reached in this case.

The case of *Home Insurance Co.* v. *Dick, supra*, involved a contract of marine insurance issued and paid for in Mexico and insuring a vessel which was never inside the state of Texas, the state in which suit on the policy was brought. The original insurance was payable in Mexico. After this insurance was issued, the risk was reinsured (outside of Texas) by a New York insurer which was qualified to do business in Texas. The original assured assigned the policy to a citizen of Texas who was then in Mexico and remained there until after the occurrence of the loss; after which he

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[3] See also Brooks v. Travelers' Protective Ass'n of America, E.D. N.Y., 47 F. 2d 618.

[4] Galliher v. State Mutual Life Ins. Co., 150 Ala. 543, 43 So. 833.

[5] See Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S.W. 339, 340; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 149; cf. Home Insurance Co. v. Dick, 281 U.S. 397, 406, 409, 410.

[6] Cf. Sampson v. Channell, 1 Cir., 110 F. 2d 754, cert. denied, 310 U.S. 650.

returned to Texas and brought an *in rem* action in Texas by garnishment proceedings directed against the domestic insurance agents. The defendants pleaded a stipulation in the policy forbidding suit except within one year next following the loss. The Texas courts denied the defendants the benefit of this stipulation. They held it was invalidated by a Texas statute outlawing such agreements. The Supreme Court of the United States reversed the Texas courts by a unanimous vote. In an opinion written by Mr. Justice Brandeis, the Court stated that the statute as construed by the Texas courts deprived the defendants of property without due process of law. This statute, the Court held, increased their obligation and imposed burdens they had not contracted for; and this, the Court held, could not be done even in the name of the public policy of Texas.

[fol. 119] This holding was followed by Judge Strum, of the District Court for the Southern District of Florida, later a member of this Court, in the case of *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145, which involved the Florida statute we are here considering. But, appellee argues, in the Holderness case the plaintiff was a resident of the state of North Carolina, the policy was issued in North Carolina, and the building which was insured was located in North Carolina ("Holderness was nothing more than a sojourner in the State of Florida."). Thus, he contends, the Holderness decision, like the Dick decision, was dictated by a situation which is not duplicated in this case: the forum's lack of sufficient connection with the disputed contracts to warrant the invocation of the public policy of the forum.

Assuming that a state might, if its connections with a foreign contract are sufficiently great, be permitted to effectuate its own public policy by striking down an agreement which was valid where made, the question remains: are the contacts which Florida has with this contract great enough to permit this to be done in this case? These contacts consist of nothing more than the presence of the insured property and the beneficiary in the state of Florida beginning subsequent to the formation of the contract and continuing up to the time of the suit. Nothing was to be done in Florida pursuant to the insurance contract except the purely min-

isterial act of payment by the insurer, and that was so only because of the fortuitous circumstance of the assured's removal from Illinois to Florida. Under strikingly similar circumstances, the Supreme Court has held that the forum [fol. 120] state did not have the right to deprive a defendant of a contractual provision limiting the time within which suit could be brought. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, reh. den., 292 U.S. 607.

In the Delta & Pine Land case, the contract concerned a fidelity bond by which the defendant, a Connecticut corporation, qualified to do business in Mississippi and Tennessee, had insured the plaintiff, a Mississippi corporation with its principal office in Tennessee, against loss resulting from dishonesty of its employees "in any position anywhere." The policy listed twenty-one employees who were then working in Mississippi.[7] The contract, however, was negotiated and executed in Tennessee. It contained a condition that any claim under the contract had to be made within fifteen months from the termination of the suretyship agreement. One of the employees whose acts were insured against committed defalcations in Mississippi and the insured sued the indemnitor in that state. A Mississippi statute stated that all contracts of insurance on property, lives or interests in Mississippi were deemed made in that state; another stated that the Mississippi statutory periods of limitations of actions could not be altered by private agreements. The Mississippi court, applying these statutes, struck down the aforementioned contractual condition and allowed recovery on the contract despite the plaintiff's failure to make claim within the fifteen-month period. The Supreme Court reversed in a unanimous decision.

[fol. 121] The following language from the Supreme Court's opinion sets forth precisely the principles we must follow and the decision we must make in the present case:

> "It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's

[7] Watson v. Employers Liability Co., 348 U.S. 66, 77.

duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Co. v. Dick, supra, p. 408), it may not on grounds of policy ignore a right which has lawfully vested elsewhere if, as here, the interest of the forum has but slight connection with the substance of the con-
[fol. 122] tract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Ins. Co. v. Dunken, supra; Home Insurance Co. v. Dick, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in

a different manner. Compare Bond v. Hume, 243 U.S. 15, 22. But clearly this is not such a case." 292 U.S. at 149, 150.

In accordance with the foregoing, we hold that the provision in the subject insurance policy which limits the time in which suit can be brought is a substantial property right which is protected by the Fourteenth Amendment to the Constitution, and under the circumstances of this case a violation of due process would result from the application of Florida Statute 95.03 to this provision.

As the Supreme Court observed in the Delta & Pine Land case, our conclusion that it would violate due process renders unnecessary a consideration of whether it would violate the full faith and credit or the contract clauses of the [fol. 123] federal constitution. Extensive research, however, among the decisions of the Supreme Court and the lower federal and state courts relating to control of interstate relations by the due process and full faith and credit clauses discloses that the Dick and Delta & Pine Land decisions have been cited many times and have never been called into question or limited by later decisions of the Supreme Court. See, e.g., *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 71, 76-78; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590, 591; *Order of Travelers* v. *Wolfe*, 331 U.S. 549, 608, 628; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 211; cf. *Hanson* v. *Deckla*, 357 U.S. 235, 254; *Hoopeston Co.* v. *Cullen*, 318 U.S. 313.

The cited cases form part of a larger body of law which has as a basic premise the principle that only where a state has significant interests involved may it impair property rights created in other states. See, e.g., *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 209-11. A secondary principle which is also of significance here is that even though the affected interests of the state may be substantial enough to justify its refusal to give affirmative help in enforcing a foreign contract which it finds obnoxious, these interests may, on the other hand, be insufficient to justify the state's rewriting of the contract, enlarging the obligation of the makers and enforcing it in a manner contrary to their undertaking. *Watson* v. *Employers Liability Corp.*,

348 U.S. 66, 76 (concurring opinion); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149, 150; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408-10; [fol. 124] see also *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145.

Following the principles set out above, we hold that the district court erred in failing to sustain the appellant's defense to this suit.

The judgment of the district court is Reversed and the case is Remanded for entry of judgment in favor of the appellant.

RIVES, Circuit Judge, Dissenting:

The Legislature of the State of Florida has enacted that, "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . . , at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." Florida Statutes Annotated, §95.03. The language of that statute seems to me to leave no room for construction; it applies to "any contract whatever."

No one has attacked the validity of that statute as applied to contracts made in Florida, or can reasonably do so. Stipulations shortening the period of limitation result in the same evils and abuses whether entered into in the State of Florida or outside that State. I cannot agree that the [fol. 125] Florida Legislature, or the courts of that State, must accord to such a stipulation contained in an ambulatory contract of insurance held by a Florida resident, but entered into in Illinois, any greater sanctity than they would accord to such a stipulation made in Florida. I think that the Florida Legislature can protect residents of that State against the application in Florida courts of stipulations shortening the period of limitation in contracts performed in Florida regardless of the place where the contracts are executed. I therefore respectfully dissent.

[fol. 126]

IN THE UNITED STATES COURT OF APPEALS

No. 17,525

SUN INSURANCE OFFICE LIMITED

versus

JOHN CLAY

JUDGMENT—April 8, 1959

This cause came on to be heard on the transcript of the Record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in favor of the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

[fol. 131]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION OF JOHN CLAY FOR REHEARING —Filed May 12, 1959

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

John Clay, plaintiff-appellee, above named, presents this, his petition for a rehearing in the above entitled cause and in support thereof respectfully shows:

1. The Court in its opinion of reversal herein has clearly failed to recognize that Florida Revised Statute 95.03 (1957) emphatically declares that any attempt to govern the Florida Statute of Limitations by contract is contrary to the public policy of the State and is illegal and void.

[fol. 132] 2. The Court in its opinion of reversal herein assumes that the Supreme Court of Florida would reach the same conclusion that the Kentucky Court reached in *Union Central Life Insurance Company* v. *Barnes,* 175 Ky. 364, 194 S.W. 339, although the State of Kentucky does not have a statute similar to or in any wise resembling Florida Revised Statute 95.03 (1957) and the Court completely disregards the ruling of the Alabama Supreme Court in the case of *Galliher* v. *State Mutual Life Insurance Company,* 150 Ala. 543, 43 So. 833, which said case is a ruling on a statute similar to and having the same effect as Florida Revised Statute 95.03 (1957).

3. The Court in its opinion of reversal herein has abrogated the validity of a statute of the State of Florida although the validity of said statute was not attacked by the appellant.

4. The case of *Hartford Accident and Indemnity Company* v. *Delta and Pine Land Company,* 292 U.S. 143, reh. den. 292 U.S. 607, which the Court regards as a conclusive

ruling of its opinion of reversal herein is clearly distinguishable from the case at bar in that the Delta and Pine Land case dealt with a fidelity bond, covering employees located in various States of the Union, while the case at bar deals with a personal property floater policy (world wide), covering property owned by a citizen of the State of Florida and located within the State of Florida.

5. The Court in its opinion has failed to recognize that the complaint alleges that the appellant-defendant is a corporation authorized to do business in Florida and that [fol. 133] this allegation is admitted by the answer of the appellant defendant; that therefore the appellant was subject to the laws of Florida and the effect that this situation has on due process.

Wherefore, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be upon further consideration, affirmed.

Paschal C. Reese, 209 South Olive Avenue, West Palm Beach, Florida, Attorney for Appellee.

Certificate of Counsel (omitted in printing).

[fol. 134]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION OF STATE OF FLORIDA FOR REHEARING —Filed May 12, 1959

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

The State of Florida, by its Attorney General, Richard W. Ervin, joins the appellee, John Clay, in petitioning for a rehearing in the above-entitled cause and in support thereof respectfully shows:

(1) The Court in its opinion of April 8, 1959, assumed that the Supreme Court of Florida would reach the same conclusion that the Court of Appeals of Kentucky reached in *Union Central Life Insurance Company* v. *Barnes*, 175 [fol. 135] Ky. 364, 194 S.W. 339. The clear and unambiguous language of Section 95.03, Florida Statutes, would permit no such conclusion. Said section prohibits the courts of Florida from giving *any* effect to stipulations contained in any contract fixing the period of time in which suits may be instituted under such contract.

(2) The Court in its opinion of April 8, 1959, overlooked: (a) the fact that the State of Florida is not only the location of the forum but is also the state in which the cause of action arose; and (b) the fact that not only is the appellee a resident of the State of Florida but the appellant is admitted to do business in Florida and has thereby subjected itself to regulation of its insurance business by the State of Florida. These facts in addition to those enumerated on page 7 of the Court's opinion justify the imposition of Section 95.03, Florida Statutes, upon the contract in question.

(3) The Court in its opinion of April 8, 1959, overlooked: (a) the fact that a contract of insurance is not an ordinary bilateral contract but is a "form" type contract [cf. *The Kensington*, 183 U.S. 263]; and (b) the fact that the "agreement" to fix a period of limitations in the contract in question, since it relates to the administration of justice, is not entitled to the same protection accorded to ordinary contract provisions [cf. *Carbon Black Export* v. *SS Monrosa*, (5th Cir.) 254 F.2d 297, cert. dismissed ..... U.S. ....., 3 L. Ed. 2d 723].

(4) The case of *Hartford Accident and Indemnity Company* v. *Delta and Pine Land Company*, 292 U.S. 143, which the Court in its opinion of April 8, 1959, relied most heavily [fol. 136] upon, is clearly distinguishable from the case at bar in that the stipulation in question in said case was as follows:

> "Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termina-

> tion of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law." 150 So. 206.

The stipulation requiring presentation of a claim within fifteen months, *not* the stipulation requiring the institution of a suit within twelve months, was at issue in the *Delta and Pine Land Case.*

Wherefore, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

Richard W. Ervin, Attorney General; Allan F. Milledge, Assistant Attorney General, Capitol Building, Tallahassee, Florida, *Amicus Curiae.*

[fol. 137] Certificate of Counsel (omitted in printing).

[fol. 149]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

MINUTE ENTRY OF ORDER DENYING PETITIONS FOR REHEARING—May 28, 1959

It is ordered by the Court that the petitions for rehearing filed in the above styled numbered cause be, and the same are hereby Denied.

"Rives, Circuit Judge, dissenting."

[fol. 150] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 151]

IN SUPREME COURT OF THE UNITED STATES

No. 349, October Term, 1959

JOHN CLAY, Petitioner,

vs.

SUN INSURANCE OFFICE LIMITED

ORDER ALLOWING CERTIORARI—October 26, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 152]

SUPREME COURT OF THE UNITED STATES

No. 349, October Term, 1959

JOHN CLAY, Petitioner,

vs.

SUN INSURANCE OFFICE LIMITED

JUDGMENT—June 13, 1960

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Fifth Circuit, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby,

vacated with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fifth Circuit for proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, John Clay, recover from Sun Insurance Office Limited Four Hundred Twenty Six Dollars and Four Cents ($426.04) for his costs herein expended and have execution therefor.

Per Mr. Justice Frankfurter

Clerk's costs	$ 194.52
Printing record	231.52
Total	$ 426.04

Dissenting opinion by Mr. Justice Black with whom Mr. Chief Justice Warren and Mr. Justice Douglas join.

Dissenting opinion by Mr. Justice Douglas.

[fol. 153] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,525

SUN INSURANCE OFFICE LIMITED, Appellant,

v.

JOHN CLAY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

CERTIFICATE AS TO QUESTIONS CERTIFIED BY THIS COURT TO THE SUPREME COURT OF THE STATE OF FLORIDA—
Filed August 12, 1960.

Pursuant to the opinion and mandate of the Supreme Court of the United States in the above entitled cause, the

following questions are certified by this Court to the Supreme Court of the State of Florida

(1) Are the provisions of Section 95.03 and 95.11(3) Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all-risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?

[fol. 254] (2) Does an all-risks policy of insurance containing the following provision,

"The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,"

and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?

It is hereby certified that the disposition of this case in this Court may be controlled by the answers given to these questions by the Supreme Court of the State of Florida.

By direction of the Court, the following documents from the files of the entitled cause are submitted to the Supreme Court of Florida for its convenience in determining the questions certified:

1. Transcript of Record
2. Brief of Appellant
3. Brief of Appellee
4. Opinion of Court of Appeals, Fifth Circuit, with dissent of Judge Rives
5. Petition for Rehearing (Appellee)
6. Petition for Rehearing of the State of Florida as Amicus Curiae
7. Brief of the State of Florida, Amicus Curiae (supporting petition for rehearing)
8. Denial of Rehearing, without opinion
9. Opinion of Supreme Court of the United States in #349, October Term 1959, John Clay, Petitioner, v. Sun Insurance Office, Limited, decided June 13, 1960.

[fol. 155]

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1961

Case No. 31,079

SUN INSURANCE OFFICE, LIMITED, Appellant,

vs.

JOHN CLAY, Appellee.

Opinion filed October 18, 1961

Certified Questions from the United States Court of Appeals, Fifth Circuit

Keen, O'Kelley & Spitz, J. Velma Keen, Charles H. Spitz and Rein, Mound & Cotton (New York, New York), for Appellant

Paschal C. Reese and Gibson, Gibson & Reese, for Appellee

Richard W. Ervin, Attorney General, Robert J. Kelly and James Mahorner, Assistant Attorneys General, as Amicus Curiae

Fred M. Burns as Amicus Curiae

OPINION

Roberts, C.J.

We here consider two questions of state law certified by the United States Court of Appeals for the Fifth Circuit to this court for decision as authorized by §25.031, Fla. Stat., and Florida Appellate Rule 4.61. The Court of Appeals acted in response to the opinion and mandate of the United States Supreme Court in Clay v. Sun Insurance Office, Limited, #349, October Term 1959, opinion filed June 13, 1960, 363 U. S. 207, 80 Sup. Ct. 1222, 4 L. Ed. (2d) 1170, which vacated the judgment of the Court of Appeals in the cause, Sun Insurance Office Limited v. John Clay, C. A. 5, 265 F. 2d 522, and remanded the cause to such court.

Original Filed—November 9, 1961

[fol. 156] The facts and circumstances culminating in the instant litigation, and its history, are stated in detail in the opinions of the federal appellate courts referred to above. The salient facts necessary to our determination of the legal questions presented to this court for decision are, however, stated in the questions as certified to this court by the Court of Appeals. The first question certified reads as follows:

> "(1) Are the provisions of Section 95.03 and 95.11 (3) Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all-risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?"

Section 95.03, supra, was enacted in 1913 as §§1 and 2 of Ch. 6465, Acts of 1913, and provides as follows:

> "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . . at a period of time less than that provided by the statute of limitations of this state are hereby declared . . . to be illegal and void. *No court of this state shall give* [fol. 157] *effect to any provision or stipulation of the character mentioned in this section.*" (Emphasis added.)

And §95.11(3), supra, specified a five-year limitation period for actions on written contracts not under seal, the type of contract with which we are here concerned.

The Fifth Circuit Court of Appeals in its opinion and judgment, supra, 265 F. 2d 522, did not decide the question of whether §95.03 was, in fact, intended to apply to a contract of insurance issued in another state to a resident of such state, since it was of the opinion that, even if applicable, a violation of the due process clause of the federal constitution would result from invalidating the 12-month "suit clause" in the subject insurance contract. On certiorari to review such judgment a majority of the United States Supreme Court, speaking through Mr. Justice Frankfurter, held that, under settled canons of constitutional adjudication, "the constitutional issue should have been reached only if, after decision of two non-constitutional questions, decision was compelled." Accordingly, the judgment of the Court of Appeals was vacated and the cause remanded in order to secure from this court a decision on the two unresolved questions of state law now before us. Clay v. Sun Insurance Office Limited, supra.

In a dissenting opinion Mr. Justice Black, joined by the Chief Justice and Mr. Justice Douglas, argued strongly that all questions of law in the case—constitutional and non-constitutional—could properly and should be decided without further delay by the High Court; and he proceeded to do so, advancing cogent reasons in support of the applicability of §95.03 to the subject contract and its constitutionality when so applied.

We are not here concerned, of course, with the constitutionality vel non of §95.03 as applied to so-called foreign contracts, including the subject contract, since this question is not before us. In view, however, of the ruling of the Court of Appeals respecting the validity of the statute as applied to the subject contract, we have considered [fol. 158] the question of the applicability of the statute to the subject contract in the light of the well settled rule of statutory construction that a statute must be construed, if fairly possible, so as to avoid "not only the conclusion that it is unconstitutional, but also grave doubts on that score," Burr v. Florida East Coast R. R., 1919, 77 Fla. 259, 81 So.

464. Assuming arguendo that we are as sanguine as appellant insurance company that "grave doubts" should be held to exist as to the validity of §95.03 as applied to the subject contract, we must conclude, nevertheless, that it is not "fairly possible" to construe the statute as applicable solely to contracts made and executed in Florida, as here contended by appellant.

Obviously, as pointed out by the appellant, the Legislature of this state could not conceivably have any interest in a contract executed in another state by residents of other states, involving property in another state; and we agree with appellant that "Imputing any such intention to the Florida Legislature would be an absurdity." But a statute must, of course, be read in its entirety; and we think it is equally clear, from the last sentence thereof, quoted and emphasized above, that the Legislature intended the Act to apply to "any contract whatever"—foreign or domestic—when Florida's contact therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon. And, in such event, nothing could be clearer than the legislative mandate that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

From the facts set forth in the certified question, it is clear that this state's contact with the subject contract and parties thereto is abundantly sufficient to give a court of this state jurisdiction of a suit thereon. Accordingly, the first question certified to this court, supra, must be answered in the affirmative. This holding is in accord with the general rule stated in 29A Am. Jur., Insurance, Sec. 1794, p. 865, as follows:

> [fol. 159] " . . . [W]here the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

See also Galliher v. State Mutual Life Insurance Co., 150 Ala. 543, 43 So. 833; Asel v. Order of United Commercial Travelers of America, 355 Mo. 658, 197 S. W. 2d 639; Gulf

Insurance Co. v. Holland Construction Co., 218 Ark. 405, 236 S. W. 2d 1003; and Watson v. Employers' Liability Assur. Corp., 348 U. S. 66, 99 L. Ed. 74, 75 S. Ct. 166.

The other question of state law which we are requested by the Court of Appeals to decide is stated by such court as follows:

> "(2) Does an all-risks policy of insurance containing the following provision,
>
> > 'The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,'
>
> and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?"

We have concluded that this question must also be answered in the affirmative. The policy in question, designated on its face as a "Personal Property Floater Policy (World Wide)," is an "all risk" type of insurance policy. "This type of contract has been said to cover every conceivable loss or damage that may happen except when occasioned by the wilful or fraudulent act or acts of the [fol. 160] insured." 2 Richards on Insurance (5th Ed.) §212. The appellant also points out in its brief that, in Pierce's *Development of Comprehensive Insurance for the Household*, it is said that in an "all risk" policy "it is the list of excluded causes of loss which is used to determine the true scope of the hazard coverage."

Clearly, then, in the absence of a provision expressly excluding from coverage loss caused by vandalism or theft on the part of the wife of the insured, and under the rule that an insurance policy must be liberally construed in favor of

the insured, National Surety Co. v. Williams, 74 Fla. 446, 77 So. 212, it should be held that the loss here sustained is within the coverage of an "all risk" policy.

But, argues the appellant, the subject policy was a "family policy," insuring all the family property, some joint and some individually owned, and should be construed "to cover only against 'risks,' and not against deliberate acts by one of the persons insured . . ." The short answer to this contention is that the acts of vandalism and theft committed by the wife, in the husband's absence from their common residence and without his consent, involved property owned by the husband alone, and that the wife would be criminally liable for her actions in this respect under the decision of this court in State v. Herndon, 1946, 158 Fla. 115, 27 So. 2d 833; and that the husband alone, and not the wife, was a party to the subject contract of insurance.

These circumstances, and the rule of the National Surety Co. case, and numerous others, noted above, require a finding that the loss here sustained is within the coverage of the subject "all risk" policy; and we so hold.

At the risk of unduly lengthening this opinion, we deem it appropriate to note that we have also considered, sua sponte, the question of our jurisdiction constitutionally to entertain the subject proceeding under the authority to do so contained in §25.031, Fla. Stat., and Florida Appellate Rule [fol. 161] 4.61, providing respectively as follows:

> "25.031 Supreme court authorized to receive and answer certificates as to state law from federal appellate courts.—The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions con-

cerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

and Rule 4.61 (Florida Appellate Rules):

"a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

"b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this State.

[fol. 162] "c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

"d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

"e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such

record may be necessary in the determination of said cause.

"f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

"g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of said certificate in the appellate court of this State having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days thereafter.

[fol. 163] "h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

We have requested briefs from the parties on this question. We are indebted also to amicus curiae, the Honorable Fred M. Burns, Assistant Attorney General of this State, who held such post in 1945 at the time the legislation now appearing as §25.031 was conceived, drafted and enacted into law, for the history of this legislation and an exhaustive brief on the question of its validity.

Section 25.031 was enacted as §1 of Ch. 23098, Acts of 1945, prior to the adoption in 1956 of the Revised Judiciary Article which, among other things, provides:

"Section 3. *Practice and procedure.*—The practice and procedure in all courts shall be governed by rules adopted by the supreme court." Art. V, Constitution of Florida.

The statute authorized this court to provide, by rule of court, for the certification to it by federal appellate courts

of questions of state law determinative of a cause pending in a federal court, "which certificate the supreme court of this state, by written opinion, may answer." Rule 4.61 of the Florida Appellate Rules was adopted by this Court "pursuant to the power vested in this Court under Article V of the Florida Constitution to adopt rules governing the practice and procedure in all courts of this State . . ." In Re: Florida Appellate Rules, opinion filed March 1, 1961. The Rule re-stated the provisions of the statute and added details relating to the form and content of the certificate. Its adoption was a valid exercise of our organic power and provided a procedure for assisting, in a spirit of comity, the Federal Appellate system in questions of state jurisprudence, no other forum for so doing having been established by the laws of Florida.

[fol. 164] It is obvious, therefore, that we need not concern ourselves with the question of whether this court derives its authority to entertain the subject proceeding from the statute or from the rule since, in either case, we have it. Cf. State v. Furen, Fla. 1960, 118 So. 2d 6.

The real question here is whether §4 of Revised Article V of our Constitution, adopted in 1956, which delineates the appellate jurisdiction of this court and provides for the issuance by it of named writs, should be construed as prohibiting this court from exercising any judicial powers other than those expressly provided for therein. Some doubt as to whether we may constitutionally exercise the judicial power attempted to be conferred by §25.031 and Rule 4.61 has been generated by the language of this court in City of Dunedin v. Bense, Fla. 1956, 90 So. 2d 300, at page 302, as follows:

> "The orbit within which the Supreme Court must function was well defined in State ex rel. Watson v. Lee, 150 Fla. 496, 8 So. 2d 19. We there held that jurisdiction of the Supreme Court is conferred by the Constitution itself. It is not endowed with any common-law prerogative outside of the boundaries established by organic law. Certainly, the appellate jurisdiction is clearly defined. Its original jurisdiction is stated with equal clarity. The ancillary constitutional writs referred to as those 'necessary or proper to the complete

> exercise of its jurisdiction' are writs which are incidental to the jurisdiction either appellate or original otherwise delineated by the Constitution. If the last quoted provision were extended beyond this scope, then obviously by the simple process of passing a law, the Legislature could expand the original jurisdiction of the Supreme Court to an illimitable degree . . . . "

[fol. 165] It should be noted that in the City of Dunedin case the court was considering a statute attempting to vest in this court original jurisdiction to issue a writ of injunction—a writ not listed among those which the constitution, in §4 of Article 5, expressly enumerates. Moreover, as pointed out by this court in its opinion in that case, the statute would "empower this court to encroach upon the nisi prius jurisdiction of the Circuit Courts which, according to Section 6, Article V, of the Constitution, 'shall have exclusive original jurisdiction in all cases in equity. . . .'" When read in context and in the light of ancient and well settled principles of law, the City of Dunedin case does not appear to be controlling here.

Thus, there is no question but that state constitutions are in no manner grants of power, as is the federal constitution, but are limitations upon the power of the state legislature. *All power not limited by a state constitution inheres in the people of that state.* The cases so holding are legion. See also 6 Fla. Jur. 298, §37, stating:

> "Although the Federal Constitution bestows power only in specific grants and is a document of delegated powers, the Florida Constitution is a limitation on power as distinguished from a grant of power, particularly with regard to legislative power."

"'It is a fundamental principle of constitutional law that each department of government, whether federal or state, "has without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." 1 Andrews' American Law (2d ed.)

Sec. 182, p. 221.' In Matter of Richards, 333 Mo. 907, 63 S. W. 2d 672, 675." Re Integration of Nebraska State Bar Association, 133 Neb. 283, 1937, 275 N. W. 265, 114 A.L.R. 151. Accord: In re: Petition of Florida State Bar Ass'n, Fla. 1949, 40 So. 2d 902.

[fol. 166] With respect to legislation involving the judicial power inherent in the state, it has been many times held by this court that, while the Legislature cannot restrict or take away jurisdiction conferred by the constitution, constitutional jurisdiction "can be enlarged by the Legislature in all cases where such enlargement does not result in a diminution of constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the constitution." Chapman v. Reddick, 41 Fla. 120, 25 So. 673, at page 677. Accord: Harry E. Prettyman, Inc. v. Florida Real Estate Commission, 92 Fla. 515; 109 So. 442, 445; South Atlantic Steamship Co. v. Tutson, 139 Fla. 405, 190 So. 675, 681; Pournelle v. Baxter, 142 Fla. 517, 195 So. 163.

It is now well established procedure for a federal court to abstain from deciding the merits of a case so as to afford the state courts a reasonable opportunity to construe a state statute involved in the case. As stated in Harrison v. N.A.A.C.P., 360 U. S. 167, 79 Sup. Ct. 1025, 3 L. Ed. (2d) 1152

> "This now well established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521 . . ., as their 'contribution . . . in furthering the harmonious relation between state and federal authority. . . .' Railroad Com. v. Pullman Co., 312 U.S. 496."

[fol. 167] And statutes such as §25.031—enacted by the Florida Legislature "with rare foresight," to borrow Mr. Justice Frankfurter's words describing its action in this

respect—cannot help but contribute substantially to the salutary policy quoted above, since such statutes would provide a vastly more expeditious method of securing an authoritative decision by the court of last resort of a state on a doubtful question of state law than does the declaratory judgment procedure, the route frequently followed in such cases. See Harrison v. N.A.A.C.P., supra; Allegheny County v. Mashuda Co., 360 U. S. 185, 79 Sup. Ct. 1060, 3 L. Ed. (2d) 1163; cf. Meredith v. Winter Haven, 320 U. S. 228, 64 Sup. Ct. 7, 88 L. Ed. 9.

We have concluded that, in the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the Supreme Court to those matters expressly conferred upon it, *and in the absence of a constitutional provision expressly conferring upon another court jurisdiction to exercise the judicial power* which is the subject matter of §25.031 and Rule 4.61, and in the light of the well settled rule that all sovereign power, including the judicial power, "not limited by a state constitution inheres to the people of [the] state," such power may be granted to this court by statute if it is deemed to be a substantive matter, or by a rule of this court if it is deemed to be a matter of "practice and procedure," cf. State v. Furen, supra, 118 So. 2d 6. It follows that this court, having in the background derived authority both by statute prior to 1956 and by rule of court subsequent to the 1956 organic revision above referred to, may entertain the subject certificate.

Accordingly, the questions are within the contemplation of Florida Appellate Rule 4.61 and both are answered in the affirmative as hereinabove set forth.

It is so ordered.

Terrell, Thomas, Hobson, Drew, Thornal and O'Connell, JJ., concur.

[fol. 169]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17525

SUN INSURANCE OFFICE, LIMITED, Appellant,

vs.

JOHN CLAY, Appellee.

Appeal From the United States District Court for The Southern District of Florida.

OPINION—June 19, 1963

Before Jones and Bell, Circuit Judges, and Estes, District Judge.

Jones, Circuit Judge: By this opinion this Court writes another chapter, perhaps not the final one, in this litigation which commenced more than six years ago and has commanded the attention of four courts.

The appellee, John Clay, procured a personal property floater policy of insurance from the appellant, Sun Insurance Office, Limited. The policy was issued in 1952 in [fol. 170] Illinois where Clay was then living. Clay moved to Florida. The policy contained a suit clause which provided that no action could be maintained unless commenced within twelve months after the discovery of the loss, with a proviso that if the limitation was invalid under the law of the state in which the policy was issued, then suit must be brought within the shortest time permitted by the law of that state. The suit clause was valid in Illinois. A Florida statute declared such provision contrary to the public policy of the state and to be illegal and void, and directed that no court in the state should give effect to any such contract provision. In the winter of 1954-1955 property of Clay, covered by the policy, was deliberately

destroyed by Clay's wife. The loss was reported to Sun on February 1, 1955, and it denied liability on April 1, 1955.

On May 20, 1957, Clay brought an action on the policy against Sun in the District Court for the Southern District of Florida, basing jurisdiction on diversity of citizenship. Sun asserted two defenses, that the action was not brought within the time limited by the suit clause, and that the policy did not cover losses willfully caused by the spouse of the insured. The district court entered judgment for Clay on a jury verdict for $6,800. On appeal, this Court declined "to make the difficult guess as to what the Florida state courts might decide if they were presented with" the issue as to whether the Florida statute applies to a contract such as was before it. This Court held that constitutional due process requirements precluded Florida from applying its statute to the contract made in Illinois. *Sun Insurance Office, Limited* v. *Clay*, 5th Cir. 1959, 265 F. 2d 522. Reliance was placed by this Court, in reaching its decision, upon *Home Insurance Co.* v. *Dick*, 281 U. S. [fol. 171] 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928.

The Supreme Court reversed this Court's decision. *Clay* v. *Sun Insurance Office, Limited*, 363 U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170. The Supreme Court concluded that the Dick and Delta & Pine cases were not conclusive on the constitutional issue. Therefore, said the Court, a decision should have been first made as to whether, under Florida law, the Florida statute is applicable and whether the losses resulting from the wife's conduct were within the policy coverage, since the disposition of one or both of these questions might avoid the constitutional question. The Supreme Court, in closing its opinion, commented upon the observation of this Court as to the difficulties of making "a confident guess" as to how the Florida Supreme Court would construe the Florida statute. Following that comment and in concluding its opinion, the Supreme Court said:

"The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann. 1957, § 25.031. Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See Al-[fol. 172] legheny County v. Mashuda Co., 360 U. S. 185, 189, and cases cited; see also Meredith v. Winter Haven, 320 U. S. 228, 336." 363 U. S. 207, 212.

On August 12, 1960, this Court, "pursuant to the opinion and mandate[1] of the Supreme Court," certified the two questions[2] to the Supreme Court of Florida. On March 1, 1961, the Supreme Court of Florida adopted a rule relating to Certified Questions from Federal Courts. In Re Florida Appellate Rules, 127 So. 2d 444. On October 18, 1961, the Supreme Court of Florida rendered an opinion. *Sun Insurance Office, Limited* v. *Clay*, Fla., 133 So. 2d 735.

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[1] It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fifth Circuit for proceedings in conformity with the opinion of this Court.

[2] (1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to [the policy here in suit under the facts here presented]?

(2) Does an all-risks policy of insurance containing the following provision,

"The Company will also pay the actual loss of or damage (except by fire) to property of the assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured;

. . . cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?

We have a doubt as to the effect to be given to the recital in the Supreme Court's Clay-Sun Insurance Office opinion that the Florida Legislature "has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation." The citation to *Allegheny* [fol. 173] *County* v. *Mashuda Co.*, 360 U. S. 185, 189, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, would permit an inference that a use of the Florida certification statute was an invocation of abstention or the equivalent of it. But abstention, as we understand the doctrine, is a remitting of the parties in a pending federal court action to a state court for a decision of a question of state law with a determination of the other issues by the federal court; or, upon the election of the party remitted to the state court, for a complete and final adjudication by that court of the entire controversy. *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 427, 83 S. Ct. 328, 9 L. Ed. 2d 405.

We do not think the Supreme Court intended, by the recital to which we have referred, to treat the opinion of the Florida court as constituting a binding determination which became the law of the case and res judicata such as would, we believe, have been true if the parties had been remitted to the state court and it had made an adjudication in litigation inter parties during a federal court abstention. The Florida certification statute does not require nor, we think, does it contemplate that the parties in the federal litigation shall submit themselves to the jurisdiction of the state court. The rule of the Florida Supreme Court purports to require briefs and permits oral argument. The power of the federal court to make a determination of the litigable issues between the parties to the pending cause was neither transferred to nor shared with the state court. The Supreme Court of Florida has, it seems, original jurisdiction only in the issuance of extraordinary writs. Fla. Const. Art. V, Sec. 4(2); *City of Dunedin* v. *Bense*, Fla., 90 So. 2d 300.

We need not determine whether the opinion of the Florida Supreme Court, given in answer to the questions certi- [fol. 174] fied to it by this Court, is merely advisory and entitled, like dicta, to be given persuasive but not binding

effect as a precedent,[3] or is to be credited under Erie-Tompkins[4] doctrine and the rule of stare decisis as though it were the ratio decidendi of a decision made in adversary litigation before the court. A Florida District Court of Appeal has followed[5] the opinion of the Supreme Court of Florida. This Court, being "in effect, only another court of the State"[6] in a diversity action, is required to follow the opinion in its statements as to Florida law. As to the law of the United States, and particularly with respect to constitutional issues, the Florida court's views are without binding effect.

After a recital of the rule that insurance contracts are to be liberally construed in favor of the insured, the Florida court stated that the husband was covered against the willful destruction of property by his wife. The parties, on oral argument, have conceded that this is a correct statement of the law of Florida. We accept it as such.

We find the Florida court's pronouncements on the other submitted question more troublesome. In rendering an answer to the question as to whether the Florida statute is [fol. 175] applicable to the suit clause of the policy under the facts recited, the Florida court, at the outset, expressed agreement with the contention of the insurer that it would be absurd to impute to the Florida Legislature any intention of asserting an interest in a contract executed in another state by residents of other states involving property in another state. Thus, it seems to have been recognized that there might be circumstances under which

[3] Lee v. Dowda, 155 Fla. 68, 19 So. 2d 570; Myers v. Atlantic Coast Line Railroad Co., Fla. 112 So. 2d 263; State v. Florida State Improvement Commission, Fla., 60 So. 2d 747; Pell v. State, 97 Fla. 550, 112 So. 110.

[4] Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

[5] Schluter v. National Union Fire Insurance Co., Fla., 144 So. 2d 95.

[6] Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231; King v. United Commercial Travelers, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608, reh. den. 333 U. S. 878, 68 S. Ct. 900, 92 L. Ed. 1153, Cf. Comment, Robertson, Inter-Sovereign Certification as an Answer to the Abstention Problem, 21 Law., L.R. 777; Nieto, The Abstention Doctrine, 40 Denver L.C.J. 45.

Florida courts would give effect to a suit clause in an insurance contract. But, said the Florida court, it is clear "that the legislature intended the act to apply to 'any contract whatever'—foreign or domestic—when Florida's contract therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." 133 So. 2d 735, 738. The Florida court concluded that Florida's contact with the contract and the parties was sufficient to give a Florida court jurisdiction of a suit thereon. "Accordingly", said the Florida court, "the first question certified to this court, supra, must be answered in the affirmative."

If, as the Florida court says, the application of the statute to invalidate the suit clause depends upon whether the Florida court would have jurisdiction of a suit on the policy, then of course the affirmative answer was required. It is a general principle that an action on an insurance policy seeking a money judgment is a transitory action which may be brought wherever service of process can be had on the defendant. *Confederation of Canada Life Insurance Company* v. *Vega Y Arminan*, Fla., 135 So. 2d 867, cert. den. 144 So. 2d 805. If, as the Florida court has intimated, the ability to serve the insurance company with process is the Florida test for determining whether the [fol. 176] law of the forum will be applied in ascertaining the enforceability of policy clauses which are valid where the contract is made, a novel doctrine has been announced. We do not think it was intended by the Florida court to make the application of the statute in a given case dependent upon jurisdiction of the court over the parties and the subject matter in an action on the policy. It is difficult to see how the statute could be applied and an effective judgment rendered if there were no jurisdiction of the parties and subject matter.[7] Rather than attribute to the Florida court a literal meaning to the language it used, we think it intended to do no more than to declare that if the State of Florida had such significant contacts with the factual phases of the litigation as to give it a paramount

[7] But see Schluter v. National Union Fire Insurance Co., *supra*, where jurisdiction was said to be the test of the applicability of the statute.

interest in the control of the governing legal rules, then its invalidating statute would be applied. If the surmise which we have made, and we must make one, as to the meaning of the Florida court's statement of Florida law is a correct one, then it must be apparent that the court was persuaded of the existence of the required significant contacts in this case.

It seems improbable that a question would be certified to the Florida Supreme Court unless, at the time the question was certified, the federal court intended to accept the answer as "authoritatively determining" the law of the state. But if the statement of a rule of Florida law so made is based upon an erroneous concept of a principle of constitutional law, then we think we are required to examine [fol. 177] its opinion in the light of constitutional doctrines as they are understood by us.

The Florida Supreme Court, in its Clay opinion, stated that it was not "concerned, of course with the constitutionality vel non of [the Florida statute] as applied to so called foreign contracts, including the subject contract," since the question was not before it. The reason given by the Florida court for the answer returned is that significant contacts of Florida with the policy of insurance and the cause of action upon it had been shown and therefore the statute would be applied to invalidate the policy provision. In other words, it seems to us that the Florida court has said that because of the contacts, which it found to be significant, there is no due process requirement of permitting a defense under the suit clause of the insurance contract.

We are unable to separate the significant contact test from the constitutional due process question. The question of due process is a federal question. Whatever else might be said about an opinion of the Florida Supreme Court in response to a certified question from this Court, it seems certain that its conclusion as to a Federal constitutional question or its premise from which it reaches such conclusion are not binding upon us as the law of the case, res judicata, stare decisis, or otherwise. We are of the view that we can and must decide whether there are here the significant contacts upon which the application of the Florida statute depends. This we think we must do uncontrolled by the Florida court's opinion and uninfluenced

by what it has said except as we are persuaded by such [fol. 178] logic as is to be found in its reasoning and the weight of any precedents which may support it.

Prior to this case there had been two decisions where the effect of the Florida statute had been considered. One of these, by the Supreme Court of Florida, held that the delivery of an insurance certificate in Florida made the contract subject to Florida law, including the statute making void contract clauses reducing the statutory limitation for bringing suits. *Sovereign Camp, Woodmen of the World*, v. *Mixon*, 79 Fla. 420, 84 So. 171. The inference can be urged that had the certificate been issued in a state where there was no invalidating statute, the suit clause could have been successfully interposed as a defense. The other case was decided by the United States District Court for the Southern District of Florida. *Holderness* v. *Hamilton Fire Ins. Co.*, 54 F. Supp. 145. It was there held that the Florida statute could not be asserted to bar a suit clause defense in an action on a fire policy issued in North Carolina upon a building in North Carolina where the clause was valid. The law of Florida, as declared in these two cases, has been thus stated:

> "Stipulations in an insurance policy shortening the period within which suits must be instituted under it to a period less than that provided by the statute of limitations are illegal and void under the statutes of this state. This rule applies to contracts made outside the state, if delivery of the policy is made in the state by a local agent so as to make the contract subject to Florida law. But there is an important qualification. If the stipulation limiting the period during which [fol. 179] action may be brought under a policy is valid by the law of the state where the contract was executed and is to be performed, that stipulation will be recognized in Florida as a defense, though the court will not affirmatively enforce performance in such cases." 18 Fla. Jur. 300, Insurance § 406.

Subsequent to the opinion of the Florida Supreme Court in the Clay matter and to the opinion of the Florida Dis-

trict Court of Appeal in the Schluter case, another Florida Court of Appeal decision was rendered. It did not involve the particular Florida statute which is here before us, but consideration was given to the Florida law with respect to contractually created defenses to actions which are or may be invalid under the law of the forum. The "significant contacts" rule was recognized and applied. The court said:

> "When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a defense lawfully vested under the law of the latter jurisdiction may not be ignored by the forum if that state had no significant connection with the contract obligations. Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of Florida." Confederation Life Association v. Ugalde, Fla. 151 So. 2d 315, 318.

The court, in the Ugalde case, gave approval to the Holderness decision and to the former opinion of this Court in [fol. 180] *Sun Insurance Office* v. *Clay*. The court also cited with approval the Dick case and the Delta and Pine case upon which this Court relied in its former opinion in this case.

The presence or absence of the significant contacts is, we think, the determinant of constitutional due process. *Watson* v. *Employers Liability Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74. In its former opinion, as has been earlier noted, this Court was guided by the principles stated in the Dick case and in the Delta and Pine case, supra. Our further consideration of the constitutional issue has left us convinced that the reasoning of the former opinion of this Court is sound. It is our view that the decision previously made was correct and that we should adhere to it. The doctrine of the Dick and Delta and Pine cases which was set forth in this Court's former opinion and there regarded as controlling is still believed by us to be the governing principle upon which the case should be decided. We cannot find that the rule of these precedents

has been overruled or modified. The Supreme Court has referred to them in terms of approval. *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687, 173 A.L.R. 1107. It is urged that *Watson* v. *Employers Liability Assurance Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74, requires a different conclusion. We are not so persuaded.

The Watson opinion, commenting on the Delta & Pine case, noted that the activities of Mississippi, the state of the forum, in connection with the policy were so slight and so casual that Mississippi could not apply its own law in such a way as to enlarge the obligations of a contract validly created under the law of another state. In the Delta and Pine case a Connecticut insurance company had [fol. 181] entered into a fidelity bond in Tennessee insuring a Tennessee corporation against loss resulting from dishonesty of employees. A condition of the contract required all claims to be filed within fifteen months from the termination of the contract. A Mississippi statute provided that statutes of limitation could not be altered by private agreement. An employee of the insured corporation defaulted. No claim was made within the fifteen-month period. The Mississippi court held the contract provision invalid and allowed recovery. The Supreme Court, by a unanimous decision, reversed. The local contacts of Florida, in the case before us, are certainly no more, and in our view are less, than in the Delta and Pine case. We are, we believe, required to follow it.

In the Ugalde case, supra, the policy was issued by a Canadian insurance company in Cuba to a Cuban resident who came to the State of Florida and there demanded payment of the cash surrender value of the policy in United States dollars in accordance with the terms of the policy. It was held that there were no such significant Florida contacts as prevented the Florida courts from applying a Cuban law which required payment in Cuban currency. This Court has held that the law of Illinois controlled in an action on a life insurance policy issued in Illinois on which a diversity suit was brought in Florida after the removal to and death of the insured in Florida. *Mutual Life Insurance Co. of New York* v. *Hess*, 5th Cir. 1947, 161

F. 2d 1; *In re Mutual Life Insurance Co. of New York*, 5th Cir. 1951, 188 F. 2d 424. In the earlier decision of this Court in this cause it was held that the State of Florida did not have sufficient contacts to deprive the insurer of its defense under the suit clause. 265 F. 2d 522, 526. This [fol. 182] holding is probably not the law of the case in view of the Supreme Court's remand. It is, however, in our opinion, a sound conclusion which should be restated and reaffirmed. We therefore decide, as was before decided, that the district court erred in failing to sustain the appellant's defense to the action. The judgment of the district court will be reversed and the cause remanded for the entry of a judgment for the appellant.

Reversed and Remanded.

[fol. 183]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 17,525

D. C. Docket No. 7608-M-Civil

SUN INSURANCE OFFICE, LIMITED, Appellant,

versus

JOHN CLAY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Jones and Bell, Circuit Judges, and Estes, District Judge.

JUDGMENT—June 19, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of a judgment for the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: Aug 1 1963

Recoverable Costs:

Docketing Cause, Etc. $25.00

[fol. 184] Clerk's Certificate (omitted in printing).

[fol. 185]

SUPREME COURT OF THE UNITED STATES

No. 470, October Term, 1963

JOHN CLAY, Petitioner,

vs.

SUN INSURANCE OFFICE, LIMITED

ORDER ALLOWING CERTIORARI—December 2, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
SEP 16 1963
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 470

JOHN CLAY, *Petitioner,*

vs.

SUN INSURANCE OFFICE, LIMITED, *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PASCHAL C. REESE
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West Palm Beach, Florida
Attorney for Petitioner

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29 American Jurisprudence (Insurance, Section 1394, p. 1041) 8

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. .....

JOHN CLAY, *Petitioner*,

vs.

SUN INSURANCE OFFICE, LIMITED, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

John Clay, by his undersigned counsel, petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on [redacted] JUNE 19, 1963

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit record (Supp. R. 19-32) dated June 19, 1963, is printed in Appendix "C".

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 6, 1963 (Supp. R. 34). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED FOR REVIEW.

Should a federal court sitting in Florida recognize a "suit clause" contained in a personal property insurance policy issued in Illinois but under which loss occurred in Florida, the insured at the time of the loss being a resident of the State of Florida? All of the property for which the claim was made having been located in the State of Florida, and the insurer being admitted to do business in Florida?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision upon which the Court below based its opinion is the due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

The statutes involved in this case are Section 95.03, Florida Statutes 1957, and Ill. Rev. Stat. 1957, Chapter 73, Section 837, which are printed in Appendix "A" and Appendix "B" of this petition.

STATEMENT OF THE CASE.

A complaint was filed by the petitioner John Clay against the respondent Sun Insurance Office, Limited, on May 20, 1957, in the United States District Court for the southern district of Florida, Miami division, seeking to recover $13,500.00 claimed in damages for loss of personal property under a personal property floater policy issued to the petitioner by the respondent on April 22, 1952 (R. 2, 3, 4). Attached to the complaint is a copy of the insurance policy (R. 8-13). The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties to the suit and the fact that the amount in controversy exceeded, exclusive of interest and cost, the sum of $3,000. Service was had upon the respondent and answer to the complaint was filed June 12, 1957 (R. 4-7). In the answer, by way of affirmative defense, the respondent raised the question of the suit clause contained in the policy (R. 5). The suit was tried before a jury in West Palm Beach, Florida, on June 4, 1958, and a verdict was entered in favor of the petitioner in the sum of $6,000 (R. 14), and final judgment was filed June 4, 1958, in accordance with the verdict of the jury (R. 14). On June 12, 1958, the respondent filed a "Motion for Judgment non obstante veredicto or in the alternative for a new trial" (R. 15-16). Paragraph 7 of the motion dealt with the question presented in this petition (R. 16). The matter was heard by the United States District Court on July 15, 1958, and an order denying the motion and setting a supersedeas bond was entered on the same date (R. 17). Notice of appeal was then filed on August 8, 1958 (R. 17). Thereafter, briefs were filed by the appellant and the appellee in the lower court and the matter was argued before the United States Court of Appeals sitting in Jacksonville, Florida, on March

11, 1959. On April 8, 1959, the United States Court of Appeals for the Fifth Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 113-125). Judgment was entered by the United States Court of Appeals on April 8, 1959 (R. 126). On April 23, 1959, an extension of twenty days was granted for the filing of a motion for rehearing on the part of the plaintiff, John Clay, and the State of Florida as *amicus curiae*. On May 12, 1959, a petition for rehearing was filed by Clay, the plaintiff (R. 131, 133), and by the Attorney General of the State of Florida as *amicus curiae* (R. 134, 137). No opinion was rendered on the order denying rehearing but the Minutes of the Court reveal that the order was denied on May 28, 1959, with Circuit Judge Rives dissenting (R. 149). In the original opinion of the United States Court of Appeals (R. 113-125) and in the order denying rehearing one of the Judges dissented from the majority opinion and considered it advisable to state his personal views.

Following the denial of a rehearing, on the 26th day of August, 1959, petition for writ of certiorari was filed with the Clerk of the Supreme Court of the United States and given the docket No. 349, October Term, 1959. On October 26, 1959, the Honorable Court granted the petition for writ of certiorari and transferred the case to the summary calendar (R. 42). Following the granting of the petition for writ of certiorari, the Attorney General of the State of Florida requested permission to file briefs as *amicus curiae* on behalf of the State of Florida. The petition of the Attorney General was granted. Various briefs were filed on behalf of the petitioner and the Honorable Court heard oral argument by the attorneys for the petitioner, the respondent, and the Attorney General of the State of Florida as *amicus curiae* on the 22nd day of March, 1960. Subse-

quent to the oral argument the Court reversed and remanded the decision of the United States Court of Appeals (*Clay* v. *Sun Insurance Office, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170) with instructions to the Court of Appeals that it certify two questions concerning the case to the Supreme Court of Florida, and in pursuance to the mandate of the Supreme Court the Circuit Court propounded to the Florida Supreme Court the following questions (Supp. R. 11-22):

"(1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all-risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?"

"(2) Does an all-risks policy of insurance containing the following provision, 'The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,' and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses from acts of vandalism and from theft committed by

the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?"

The Florida Supreme Court amended its Appellate Rules by adopting a rule relating to "Certified Questions From Federal Courts" (*Sun Insurance Office, Limited,* v. *Clay,* Fla., 133 So.2d 735).

Thereafter, the Florida Supreme Court handed down its Opinion on October 18, 1961 (Supp. R. 4-17) and answered the propounded questions in the affirmative.

Thereafter, the United States Court of Appeals for the Fifth Circuit advised the attorneys for appellant and appellee that it would receive briefs if counsel desired to file briefs. Briefs were filed by the attorney for appellant and attorney for appellee. On October 2, 1962 (Supp. R. 18), the case was argued before the United States Court of Appeals for the Fifth Circuit in Jacksonville, Florida. On June 19, 1963, the United States Court of Appeals for the Fifth Circuit rendered its opinion (Supp. R. 19-31), again reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (Supp. R. 33).

REASONS RELIED UPON FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

This is the second time that this suit has been before the Supreme Court of the United States on petition for writ of certiorari. In the first instance, the Supreme Court granted the certiorari (R. 42) and reversed the Court of Appeals for the Fifth Circuit and remanded the case with instructions that the Court should propound two questions to the Florida Supreme Court, since the Court

felt that the disposition by the Florida Supreme Court of one or both of the questions might avoid the Constitutional question (*Clay* v. *Sun Insurance Office, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170).

In arriving at the conclusion that the answer to the first question, *supra*, which is in fact the only question involved in this petition for writ of certiorari, the Florida Supreme Court concluded that the contact with the contract and the parties by the State of Florida was sufficient to give a Florida court jurisdiction of a suit thereon. Subsequent to the decision by the Florida Supreme Court, *supra*, the District Court of Appeals of Florida, Second District, in reversing a Circuit Court Summary Final Decree, made a similar finding in the suit of *Frederick Schluter, Sr., Appellant*, v. *National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, Fla. 144 So.2d 95.

The United States Court of Appeals for the Fifth Circuit chose to utterly disregard the findings of the Florida Supreme Court and the Court of Appeals, Second District, and affirmed its opinion of April 8, 1959 (see Appendix "E"), by an opinion dated June 19, 1963 (see Appendix "C").

Along with many of its sister states (Carnahan, Conflict of Laws and Life Insurance Contracts, 1958, 137, page 657; 7 Couch on Insurance, 1629, page 5704), the State of Florida has by statute undertaken to forestall the insertion in insurance policies of stipulations for the bringing of suit within a limited time. Florida's statute declares stipulations in contracts to be "illegal and void" and provides that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." (95.03 Fla. Stat. 1957. See Appendix "A"). The Illinois statute deals only with life insurance con-

tracts (Ill. Rev. Stat. 1957, Ch. 73, 837. See Appendix "B").

The appellant, Sun Insurance Office, Limited, which does business in both Illinois and Florida, in an attempt to derive the greatest possible advantage from the more lax laws of Illinois, placed in the insurance contract in question the following clause:

> "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustained in any court of law or equity unless the same be commenced within twelve (12) months next after the discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

The general rule is stated in 29 Am. Jur. (Insurance, 1394), page 1041, as follows:

> "* * * Where the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

This proposition is supported by the decisions in *Galliher* v. *State Mutual Life Insurance Co.*, 150 Ala. 543, 43 So. 833 (1907); *Asel* v. *Order of United Commercial Travelers*, 197 S.W.2d 639 (Mo. 1946); *Gulf Insurance Co.* v. *Holland Construction Co.*, 236 S.W.2d 1003 (Ark. 1951); contra: *Union Central Life Insurance Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339 (1917) (no statute involved).

The Court, in its opinion of June 19, 1963, as it had in its opinion of April 8, 1959, held that a violation of the

due process would result if Par. 95.03, Florida Statutes, 1957, were applied to the insurance contract in question. In reaching this conclusion the Court relied upon *Home Insurance Company* v. *Dick*, 281 U.S. 397 (1929); *Holderness* v. *Hamilton Fire Insurance Company of New York*, 54 F. Supp. 145 (S.D. Fla. 1944); *Hartford Accident and Indemnity Company* v. *Delta Pine Land Company*, 292 U.S. 143 (1933); and *Confederation Life Association* v. *Ugalde*, Fla., 151 So.2d 315, 318. None of these cases takes the arbitrary position that the place of contracting necessarily and in all circumstances controls the validity of stipulations as to the time within which suit must be brought. In each of these cases the Court takes the position that on the particular facts of that case, sufficient connections were lacking between the state of the forum and the contract to justify the forum imposing its public policy considerations upon the contract. Each of these cases is clearly distinguished from the case at bar.

In the case of *Home Insurance Company* v. *Dick*, *supra*, the forum had substantially no connection with the contract whatsoever. The contract was made in another jurisdiction, the loss occurred in another jurisdiction, and the risk under the insurance policy was never within the jurisdiction of the forum. Similarly, in the *Holderness* case, *supra*, the forum was merely the place in which the suit happened to have been instituted. In that case the insurance policy was entered into in North Carolina, the property insured had its situs in North Carolina, and the loss occurred in North Carolina. In that case, Florida was merely the forum and nothing more.

In the case at bar, however, throughout substantially all of the contract period, the property insured was in the State of Florida, the loss to the property occurred in Florida, and consequently the cause of action arose in that

state. Florida was therefore the "natural" or "normal" forum. In addition, the insured was a bona fide resident of Florida at the time the cause of action arose, and at that time the insurer was admitted to do business in Florida. The only connection with the State of Illinois with the contract was that the contract was issued in Illinois. If it can be asserted that there are any circumstances in which a state, other than the state in which the contract was made, has sufficient interest in the contract to impose its statutes to nullify the contract stipulation on the basis of its public policy, then the case at bar presents such a situation.

The facts in the *Delta Pine Land Company* case, *supra*, are more similar to the facts of the case at bar. In that case the cause of action apparently arose in the State of Mississippi where the suit was brought and where there is a statute similar to Section 95.03, Florida Statutes, 1957, in existence. Certain other factors in that case, however, are not identical with the case at bar. In the *Delta Pine Land Company* case, the risk was not a risk of property loss in which there was a situs of the property. The risk was one involving the honesty of employees, which employees were located in several states. In the case at bar the property insured had a situs in Florida and the risk was all concentrated in that state. However, the primary difference between the *Delta Pine Land Company* case and the case at bar is that the former did not involve a contract stipulation involving the time within which suit must be brought. That case involved a stipulation requiring that a claim must be presented to the insurer within fifteen months after the termination of the suretyship (see Appendix "D").

Thus the holding in the *Delta Pine Land Company* case cannot be considered to be a holding in point, as a con-

tract stipulation regarding the time within which suit must be brought was not at issue in this case. The language of that case, however, is most important. The Court said that the question is basically one of "the relative importance of the interest of the forum as contrasted with those created at the place of the contract, * * *." (292 U.S. 150).

In addition to the factors in the case at bar that the property insured was located in Florida throughout most of the policy period, that the insured was a citizen of Florida throughout most of the policy period, that the insurer was admitted to do business in the State of Florida during all of the policy period, and that the loss occurred in Florida, several other factors pertaining to this particular type of contract are relevant. A contract of insurance is not an ordinary bilateral contract. There is no "meeting of the minds" between both parties on all of the policy provisions. A contract of insurance is a contract prepared in its entirety by the insurer and it is accepted by the insured. He has no control whatsoever over any of the terms of the policy. The only protection an insured has against unfair, unreasonable or improper provisions in the contract of insurance is the fact that, in most states, regulation is imposed on the insurer in regard to policy forms. Such form contracts are subject to the public policy of the forum (Cf. *The Kensington*, 183 U.S. 263 (1901)).

In its opinion of June 19, 1963, the United States Court of Appeals relied not only on the Dick case and the Delta Pine case, but in addition relied upon the findings of the Florida Supreme Court in the Ugalde case. The Ugalde case is certainly not a criteria for the case at bar. It is hard to imagine a state having less contact with the contract or the parties than the State of Florida had in the Ugalde case.

A final consideration is that an agreement to fix a period of limitations by contract is a matter which relates to the administration of justice and is not entitled to the same protection accorded to ordinary contract provisions (Cf. *Carbon Black Export* v. *The SS Monrosa*, 354 F.2d 297 (5th Cir. 1958), cert. denied 359 U.S.

If the interests of the forum are sufficient, neither the due process clause nor the full faith and credit clause of the Federal Constitution require the forum to apply the normal conflict of laws rules (Cf. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1934); *Young* v. *Masci*, 289 U.S. 253 (1930)). In the case at bar, the interests of the State of Florida are superior to the interests of any other state because Florida was the place of performance of the contract, it was the place in which the cause of action arose, it was the state of the policyholder's domicile, the insurance company was subject to regulation of its business in Florida, and, finally, because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

/s/ Paschal C. Reese

PASCHAL C. REESE
209 South Olive Avenue
West Palm Beach, Florida
Attorney for Petitioner

CERTIFICATE OF SERVICE.

The undersigned Attorney for Appellee, hereby certifies that true and foregoing Petition for Writ of Certiorari has been served upon BERT COTTON, Esq., REIN, MOUND & COTTON, 116 John Street, New York 38, New York, Attorney for Appellant, by United States air mail, postage prepaid, this 14th day of Sept, 1963.

/s/ Paschal C. Reese

PASCHAL C. REESE

APPENDIX

APPENDIX "A".

Section 95.03, Florida Statutes, 1957. "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section.

History—Secs. 1, 2, Ch. 6465, 1913; R.G.S. 2391; C.G.L. 4651."

APPENDIX "B".

Ill. Rev. Stat. 1957, Ch. 73, Section 837. "(1) After the effective date of this code no policy of life insurance shall be issued or delivered in this state if it contain any of the following provisions:

(a) A provision limiting the time within which any action at law or in equity may be commenced to less than three years after the cause of action shall accrue."

APPENDIX "C".

Opinion of the United States Court of Appeals for the Fifth Circuit rendered June 19, 1963.

IN THE

United States Court of Appeals

FOF THE FIFTH CIRCUIT

No. 17,525

SUN INSURANCE OFFICE, LIMITED,
Appellant,

VERSUS

JOHN CLAY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 19, 1963)

Before JONES and BELL, Circuit Judges, and ESTES, District Judge.

JONES, Circuit Judge: By this opinion this Court writes another chapter, perhaps not the final one, in this litigation which commenced more than six years ago and has commanded the attention of four courts.

The appellee, John Clay, procured a personal property floater policy of insurance from the appellant, Sun Insurance Office, Limited. The policy was issued in 1952 in Illinois, where Clay was then living. Clay moved to Florida. The policy contained a suit clause which provided that no action could be maintained unless commenced within twelve months after the discovery of the loss, with a proviso that if the limitation was invalid under the law of the state in which the policy was issued,

then suit must be brought within the shortest time permitted by the law of that state. The suit clause was valid in Illinois. A Florida statute declared such provision contrary to the public policy of the state and to be illegal and void, and directed that no court in the state should give effect to any such contract provision. In the winter of 1954-1955 property of Clay, covered by the policy, was deliberately destroyed by Clay's wife. The loss was reported to Sun on February 1, 1955, and it denied liability on April 1, 1955.

On May 20, 1957, Clay brought an action on the policy against Sun in the District Court for the Southern District of Florida, basing jurisdiction on diversity of citizenship. Sun asserted two defenses, that the action was not brought within the time limited by the suit clause, and that the policy did not cover losses willfully caused by the spouse of the insured. The district court entered judgment for Clay on a jury verdict for $6,800. On appeal, this Court declined "to make the difficult guess as to what the Florida state courts might decide if they were presented with" the issue as to whether the Florida statute applies to a contract such as was before it. This Court held that constitutional due process requirements precluded Florida from applying its statute to the contract made in Illinois. *Sun Insurance Office, Limited* v. *Clay*, 5th Cir. 1959, 265 F. 2d 522. Reliance was placed by this Court, in reaching its decision, upon *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701, and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928.

The Supreme Court reversed this Court's decision. *Clay* v. *Sun Insurance Office, Limited*, 363 U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170. The Supreme Court concluded that the Dick and Delta & Pine cases were not con-

clusive on the constitutional issue. Therefore, said the Court, a decision should have been first made as to whether, under Florida law, the Florida statute is applicable and whether the losses resulting from the wife's conduct were within the policy coverage, since the disposition of one or both of these questions might avoid the constitutional question. The Supreme Court, in closing its opinion, commented upon the observation of this Court as to the difficulties of making "a confident guess" as to how the Florida Supreme Court would construe the Florida statute. Following that comment and in concluding its opinion, the Supreme Court said:

> "The Florida Legislature, with rate foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann. 1957, § 25.031. Even without such a facilitating statute we have frequently deemed it appropriate where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See Allegheny County v. Mashuda Co., 360 U.S. 185, 189, and cases cited; see also Meredith v. Winter Haven, 320 U.S. 228, 336." 363 U. S. 207, 212.

On August 12, 1960, this Court, "pursuant to the opinion and mandate[1] of the Supreme Court," certified the two

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1. It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fifth Circuit for proceedings in conformity with the opinion of this Court.

questions[2] to the Supreme Court of Florida. On March 1, 1961, the Supreme Court of Florida adopted a rule relating to Certified Questions from Federal Courts. In Re Florida Appellate Rules, 127 So. 2d 444. On October 18, 1961, the Supreme Court of Florida rendered an opinion. *Sun Insurance Office, Limited* v. *Clay*, Fla., 133 So. 2d 735.

We have a doubt as to the effect to be given to the recital in the Supreme Court's Clay-Sun Insurance Office opinion that the Florida Legislature "has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation." The citation to *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 189, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, would permit an inference that a use of the Florida certification statute was an invocation of abstention or the equivalent of it. But abstention, as we understand the doctrine, is a remitting of the parties in a pending federal court action to a state court for a decision of a question of state law with a determination of the other issues by the federal court; or, upon the election of the party remitted to the state court, for a complete

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2. (1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to [the policy here in suit under the facts here presented]?

(2) Does an all-risks policy of insurance containing the following provision,

> "The Company will also pay the actual loss of or damage (except by fire) to property of the assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured;

. . . cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?

and final adjudication by that court of the entire controversy. *N.A.A.C.P. v. Button*, 371 U. S. 415, 427, 83 S. Ct. 328, 9 L. Ed. 2d 405.

We do not think the Supreme Court intended, by the recital to which we have referred, to treat the opinion of the Florida court as constituting a binding determination which became the law of the case and res judicata such as would, we believe, have been true if the parties had been remitted to the state court and it had made an adjudication in litigation inter parties during a federal court abstention. The Florida certification statute does not require nor, we think, does it contemplate that the parties in the federal litigation shall submit themselves to the jurisdiction of the state court. The rule of the Florida Supreme Court purports to require briefs and permits oral argument. The power of the federal court to make a determination of the litigable issues between the parties to the pending cause was neither transferred to nor shared with the state court. The Supreme Court of Florida has, it seems, original jurisdiction only in the issuance of extraordinary writs. Fla. Const. Art. V, Sec. 4(2); *City of Dunedin v. Bense*, Fla., 90 So. 2d 300.

We need not determine whether the opinion of the Florida Supreme Court, given in answer to the questions certified to it by this Court, is merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent,[3] or is to be credited under Erie-Tompkins[4] doctrine and the rule of stare decisis as though it were

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3. Lee v. Dowda, 155 Fla. 68, 19 So.2d 570; Myers v. Atlantic Coast Line Railroad Co., Fla., 112 So.2d 263; State v. Florida State Improvement Commission, Fla., 60 So.2d 747; Pell v. State, 97 Fla. 650, 112 So. 110.

4. Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

the ratio decidendi of a decision made in adversary litigation before the court. A Florida District Court of Appeal has followed[5] the opinion of the Supreme Court of Florida. This Court being "in effect, only another court of the State"[6] in a diversity action, is required to follow the opinion in its statements as to Florida law. As to the law of the United States, and particularly with respect to constitutional issues, the Florida court's views are without binding effect.

After a recital of the rule that insurance contracts are to be liberally construed in favor of the insured, the Florida court stated that the husband was covered against the willful destruction of property by his wife. The parties, on oral argument, have conceded that this is a correct statement of the law of Florida. We accept it as such.

We find the Florida court's pronouncements on the other submitted question more troublesome. In rendering an answer to the question as to whether the Florida statute is applicable to the suit clause of the policy under the facts recited, the Florida court, at the outset, expressed agreement with the contention of the insurer that it would be absurd to impute to the Florida Legislature any intention of asserting an interest in a contract executed in another state by residents of other states involving property in another state. Thus, it seems to have been recog-

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5. Schluter v. National Union Fire Insurance Co., Fla., 144 So.2d 95.

6. Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231; King v. United Commercial Travelers, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608, reh. den. 333 U.S. 878, 68 S. Ct. 900, 92 L. Ed. 1153, Cf. Comment, Robertson, Inter-Sovereign Certification as an Answer to the Abstention Problem, 21 La. L.R. 777; Nieto, The Abstention Doctrine, 40 Denver L.C.J. 45.

nized that there might be circumstances under which Florida courts would give effect to a suit clause in an insurance contract. But, said the Florida court, it is clear "that the legislature intended the act to apply to 'any contract whatever'—foreign or domestic—when Florida's contract therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." 133 So. 2d 735, 738. The Florida court concluded that Florida's contact with the contract and the parties was sufficient to give a Florida court jurisdiction of a suit thereon. "Accordingly", said the Florida court, "the first question certified to this court, supra, must be answered in the affirmative."

If, as the Florida court says, the application of the statute to invalidate the suit clause depends upon whether the Florida court would have jurisdiction of a suit on the policy, then of course the affirmative answer was required. It is a general principle that an action on an insurance policy seeking a money judgment is a transitory action which may be brought wherever service of process can be had on the defendant. *Confederation of Canada Life Insurance Company* v. *Vega Y Arminan*, Fla., 135 So. 2d 867, cert. den. 144 So. 2d 805. If, as the Florida court has intimated, the ability to serve the insurance company with process is the Florida test for determining whether the law of the forum will be applied in ascertaining the enforceability of policy clauses which are valid where the contract is made, a novel doctrine has been announced. We do not think it was intended by the Florida court to make the application of the statute in a given case dependent upon jurisdiction of the court over the parties and the subject matter in an action on the policy. It is difficult to see how the statute could be applied and an effective judgment rendered if there were no jurisdiction of the parties

and subject matter.[7] Rather than attribute to the Florida court a literal meaning to the language it used, we think it intended to do no more than to declare that if the State of Florida had such significant contacts with the factual phases of the litigation as to give it a paramount interest in the control of the governing legal rules, then its invalidating statute would be applied. If the surmise which we have made, and we must make one, as to the meaning of the Florida court's statement of Florida law is a correct one, then it must be apparent that the court was persuaded of the existence of the required significant contacts in this case.

It seems improbable that a question would be certified to the Florida Supreme Court unless, at the time the question was certified, the federal court intended to accept the answer as "authoritatively determining" the law of the state. But if the statement of a rule of Florida law so made is based upon an erroneous concept of a principle of constitutional law, then we think we are required to examine its opinion in the light of constitutional doctrines as they are understood by us.

The Florida Supreme Court, in its Clay opinion, stated that it was not "concerned, of course with the constitutionality vel non of [the Florida statute] as applied to so called foreign contracts, including the subject contract," since the question was not before it. The reason given by the Florida court for the answer returned is that significant contacts of Florida with the policy of insurance and the cause of action upon it had been shown and therefore the statute would be applied to invalidate the policy provision.

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7. But see Schluter v. National Union Fire Insurance Co., supra, where jurisdiction was said to be the test of the applicability of the statute.

In other words, it seems to us that the Florida court has said that because of the contacts, which it found to be significant, there is no due process requirement of permitting a defense under the suit clause of the insurance contract.

We are unable to separate the significant contact test from the constitutional due process question. The question of due process is a federal question. Whatever else might be said about an opinion of the Florida Supreme Court in response to a certified question from this Court, it seems certain that its conclusion as to a Federal constitutional question or its premise from which it reaches such conclusion are not binding upon us as the law of the case, res judicata, stare decisis, or otherwise. We are of the view that we can and must decide whether there are here the significant contacts upon which the application of the Florida statute depends. This we think we must do uncontrolled by the Florida court's opinion and uninfluenced by what it has said except as we are persuaded by such logic as is to be found in its reasoning and the weight of any precedents which may support it.

Prior to this case there had been two decisions where the effect of the Florida statute had been considered. One of these, by the Supreme Court of Florida, held that the delivery of an insurance certificate in Florida made the contract subject to Florida law, including the statute making void contract clauses reducing the statutory limitation for bringing suits. *Sovereign Camp, Woodmen of the World,* v. *Mixon,* 79 Fla. 420, 84 So. 171. The inference can be urged that had the certificate been issued in a state where there was no invalidating statute, the suit clause could have been successfully interposed as a defense. The other case was decided by the United States District Court for the Southern District of Florida. *Holderness* v. *Hamil-*

ton Fire Ins. Co., 54 F. Supp. 145. It was there held that the Florida statute could not be asserted to bar a suit clause defense in an action on a fire policy issued in North Carolina upon a building in North Carolina where the clause was valid. The law of Florida, as declared in these two cases, has been thus stated:

> "Stipulations in an insurance policy shortening the period within which suits must be instituted under it to a period less than that provided by the statute of limitations are illegal and void under the statutes of this state. This rule applies to contracts made outside the state, if delivery of the policy is made in the state by a local agent so as to make the contract subject to Florida law. But there is an important qualification. If the stipulation limiting the period during which action may be brought under a policy is valid by the law of the state where the contract was executed and is to be performed, that stipulation will be recognized in Florida as a defense, though the court will not affirmatively enforce performance in such cases." 18 Fla. Jur. 300, Insurance § 406.

Subsequent to the opinion of the Florida Supreme Court in the Clay matter and to the opinion of the Florida District Court of Appeal in the Schluter case, another Florida Court of Appeal decision was rendered. It did not involve the particular Florida statute which is here before us, but consideration was given to the Florida law with respect to contractually created defenses to actions which are or may be invalid under the law of the forum. The "significant contacts" rule was recognized and applied. The Court said:

> "When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a defense lawfully vested under the law of the latter jurisdiction may not be

> ignored by the forum if that state had no significant connection with the contract obligations. Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of Florida." Confederation Life Association v. Ugalde, Fla., 151 So. 2d 315, 318.

The court, in the Ugalde case, gave approval to the Holderness decision and to the former opinion of this Court in *Sun Insurance Office* v. *Clay*. The court also cited with approval the Dick case and the Delta and Pine case upon which this Court relied in its former opinion in this case.

The presence or absence of the significant contacts is, we think, the determinant of constitutional due process. *Watson* v. *Employers Liability Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74. In its former opinion, as has been earlier noted, this Court was guided by the principles stated in the Dick case and in the Delta and Pine case, supra. Our further consideration of the constitutional issue has left us convinced that the reasoning of the former opinion of this Court is sound. It is our view that the decision previously made was correct and that we should adhere to it. The doctrine of the Dick and Delta and Pine cases which was set forth in this Court's former opinion and there regarded as controlling is still believed by us to be the governing principle upon which the case should be decided. We cannot find that the rule of these precedents has been overruled or modified. The Supreme Court has referred to them in terms of approval. *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687, 173 A.L.R. 1107. It is urged that *Watson* v. *Employers Liability Assurance Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74, requires a different conclusion. We are not so persuaded.

The Watson opinion, commenting on the Delta & Pine case, noted that the activities of Mississippi, the state of the forum, in connection with the policy were so slight and so casual that Mississippi could not apply its own law in such a way as to enlarge the obligations of a contract validly created under the law of another state. In the Delta and Pine case a Connecticut insurance company had entered into a fidelity bond in Tennessee insuring a Tennessee corporation against loss resulting from dishonesty of employees. A condition of the contract required all claims to be filed within fifteen months from the termination of the contract. A Mississippi statute provided that statutes of limitation could not be altered by private agreement. An employee of the insured corporation defaulted. No claim was made within the fifteen-month period. The Mississippi court held the contract provision invalid and allowed recovery. The Supreme Court, by a unanimous decision, reversed. The local contacts of Florida, in the case before us, are certainly no more, and in our view are less, than in the Delta and Pine case. We are, we believe, required to follow it.

In the Ugalde case, supra, the policy was issued by a Canadian insurance company in Cuba to a Cuban resident who came to the State of Florida and there demanded payment of the cash surrender value of the policy in United States dollars in accordance with the terms of the policy. It was held that there were no such significant Florida contacts as prevented the Florida courts from applying a Cuban law which required payment in Cuban currency. This Court has held that the law of Illinois controlled in an action on a life insurance policy issued in Illinois on which a diversity suit was brought in Florida after the removal to and death of the insured in Florida. *Mutual Life Insurance Co. of New York* v. *Hess*, 5th Cir. 1947, 161

F. 2d 1; *In re Mutual Life Insurance Co. of New York*, 5th Cir. 1951, 188 F. 2d 424. In the earlier decision of this Court in this cause it was held that the State of Florida did not have sufficient contacts to deprive the insurer of its defense under the suit clause, 265 F. 2d 522, 526. This holding is probably not the law of the case in view of the Supreme Court's remand. It is, however, in our opinion, a sound conclusion which should be restated and reaffirmed. We therefore decide, as was before decided, that the district court erred in failing to sustain the appellant's defense to the action. The judgment of the district court will be reversed and the cause remanded for the entry of a judgment for the appellant.

REVERSED AND REMANDED.

A true copy

(Seal)

Test: EDWARD W. WADSWORTH
Clerk U. S. Court of Appeals, Fifth Circuit
/s/ G. F. Ganucheau
Deputy

New Orleans, Louisiana, August 12, 1963.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 17,525

D. C. Docket No. 7608-M-Civil

SUN INSURANCE OFFICE, LIMITED,
Appellant,

VERSUS

JOHN CLAY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Jones and Bell, Circuit Judges, and Estes, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of a judgment for the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in

this Court for which execution may be issued out of the said District Court.

June 19, 1963

Issued as Mandate:

Recoverable Costs:

Docketing Cause, Etc. . $25.00

APPENDIX "D"

Contract stipulation from *Hartford Accident and Indemnity Company* v. *Delta Pine Land Company*, 150 So. 206:

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

APPENDIX "E".

Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 8, 1963.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,525

SUN INSURANCE OFFICE LIMITED,
Appellant,

VERSUS

JOHN CLAY
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 8, 1959.)

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge.

TUTTLE, Circuit Judge: This is a suit on a personal property floater policy. It was instituted in the United States District Court for the Southern District of Florida by the insured, John Clay. A jury awarded recovery in the total amount of $6,800.00 and judgment was entered accordingly. The insurer appeals, contending the district court erred in holding that the stipulation in the policy which forbade suit unless it was instituted within twelve months next after discovery of the loss[1] was rendered

1. "Suit Clause:—No suit; action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however,

void and unenforceable by Florida Revised Statute 95.03 (1957), which reads as follows:

> "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913 fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

We agree with appellant's contention as to this defense, and therefore we do not reach its other contentions.

The policy was issued and delivered to appellee on April 22, 1952, in Chicago, Illinois. At that time appellee was a citizen of and resided in the state of Illinois. He paid the premium in a lump sum in Chicago when he received the policy. Subsequently, in July 1952, appellee moved to Florida. He purchased a ranch near Lake Harbor, Florida, in July or August 1952 and became a resident of Florida from that time on. In December, 1954 and January, 1955, while he was living at the ranch near Lake Harbor, certain of his insured personal property was destroyed by vandalism and other insured property was stolen. Appellee notified appellant of his losses on February 1, 1955. After investigating the claim, appellant denied liability on April 6, 1955. Suit was not instituted until May 20, 1957.

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that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

Under the terms of the "Suit Clause" this suit was barred because of appellee's failure to institute it within twelve months next after he had discovered the losses. According to the law of Illinois, such a contractual provision was and is valid and enforceable.[2]

This insurance policy was issued and delivered in Illinois to a citizen of that state, and it was paid for by him while he was present and residing in that state. It insured the appellee's personal property which was at that time presumably in the same state. According to the law of Florida, it was therefore an Illinois contract, the validity and interpretation of which would ordinarily be determined by the law of Illinois. *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed, 254 U.S. 665. Since the law of Illinois validates clauses limiting the time within which suit may be brought, this clause presents a good defense to appellee's suit unless the Florida statute renders in unenforceable in any Florida court.

This presents a question which substantially affects the outcome of this suit, and since federal jurisdiction in this case is based on diversity of citizenship, we must apply the law which the state courts of the forum would apply (*Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487), insofar as the state law does not violate the constitution of the United States. See *Sampson* v. *Channell*, 1 Cir., 110 F.2d 754, cert. denied 310 U.S. 650.

The wording of the Florida statute is quite general and broad, and it appears to apply to all contracts, wherever

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2. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346; *Hartzell* v. *Maryland Cas. Co.*, 163 Ill. App. 221; see also Smith-Hurd Ann. St., Ch. 73, §969a(1)(k) (1958); cf. Smith-Hurd Ann. St., Ch. 73, §§ 837(1)(a), 903(1)(a) (1958).

made or performed, which happen to be sued upon in the courts of Florida. However, there are no reported instances where this statute has been applied under circumstances similar to those presented here; and the jurisprudence of Florida gives us reason to believe that the Florida state courts would construe it as being inapplicable under these circumstances.

The following representative decisions demonstrate the Florida courts' tendency, based on their interpretation of the requirements of due process and their recognition of the general common law rules of comity, to refrain from attempting to apply Florida statutes or their own notions of public policy to foreign contracts which are valid where entered into: *Connor* v. *Elliott, supra*; *Sovereign Camp, Woodmen of the World* v. *Mixon*, 79 Fla. 420, 84 So. 171; *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, 78 So. 22; *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168, aff'd., 250 U.S. 2.

It is thus quite possible that the Florida state courts would reach the same conclusion that the Kentucky court reached in *Union Cent. Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339[3]—that the validity of a contractual provision limiting the time within which suit can be brought is to be determined by the *lex locus contractu* rather than the *lex fori*. This result could be expected if the court did not fall into the Alabama Supreme Court's error[4] of assuming that the issue presented concerned the choice of the applicable statute of limitations rather than

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3. See also *Brooks* v. *Travelers' Protective Ass'n of America*, E.D. N.Y., 47 F.2d 618.

4. *Galliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833.

the choice of the substantive law governing the validity of the contract itself.[5]

We are not obliged, however, to make the difficult guess as to what the Florida state courts might decide if they were presented with this issue, for we conclude that there is only one possible decision which would be consonant with due process of law:[6] to deny application of the Florida statute to this contract.

Examining the decisions of the Supreme Court of the United States on this subject, we find none which involves the identical circumstances presented here, but we find several which present very similar facts and which, we feel, clearly and unmistakably point out the result which must be reached in this case.

The case of *Home Insurance Co. v. Dick, supra,* involved a contract of marine insurance issued and paid for in Mexico and insuring a vessel which was never inside the state of Texas, the state in which suit on the policy was brought. The original insurance was payable in Mexico. After this insurance was issued, the risk was reinsured (outside of Texas) by a New York insurer which was qualified to do business in Texas. The original assured assigned the policy to a citizen of Texas who was then in Mexico and remained there until after the occurrence of the loss; after which he returned to Texas and brought an *in rem* action in Texas by garnishment proceedings directed against the domestic insurance agents. The defendants pleaded a stipulation in the policy forbidding suit except within one year

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5. See *Union Central Life Ins. Co.* v. *Barnes,* 175 Ky. 364, 194 S.W. 339, 340; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U.S. 143, 149; cf. *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 406, 409, 410.

6. Cf. *Sampson* v. *Channell,* 1 Cir., 110 F.2d 754, cert. denied 310 U.S. 650.

next following the loss. The Texas courts denied the defendants the benefit of this stipulation. They held it was invalidated by a Texas statute outlawing such agreements. The Supreme Court of the United States reversed the Texas courts by a unanimous vote. In an opinion written by Mr. Justice Brandeis, the Court stated that the statute as construed by the Texas courts deprived the defendants of property without due process of law. This statute, the Court held, increased their obligation and imposed burdens they had not contracted for; and this, the Court held, could not be done even in the name of the public policy of Texas.

This holding was followed by Judge Strum, of the District Court for the Southern District of Florida, later a member of this Court, in the case of *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145, which involved the Florida statute we are here considering. But, appellee argues, in the Holderness case the plaintiff was a resident of the state of North Carolina, the policy was issued in North Carolina, and the building which was insured was located in North Carolina ("Holderness was nothing more than a sojourner in the State of Florida"). Thus, he contends, the Holderness decision, like the Dick decision, was dictated by a situation which is not duplicated in this case: the forum's lack of sufficient connection with the disputed contracts to warrant the invocation of the public policy of the forum.

Assuming that a state might, if its connections with a foreign contract are sufficiently great, be permitted to effectuate its own public policy by striking down an agreement which was valid where made, the question remains: are the contacts which Florida has with this contract great enough to permit this to be done in this case? These contacts consist of nothing more than the presence of the insured property and the beneficiary in the state of

Florida beginning subsequent to the formation of the contract and continuing up to the time of the suit. Nothing was to be done in Florida pursuant to the insurance contract except the purely ministerial act of payment by the insurer, and that was so only because of the fortuitous circumstance of the assured's removal from Illinois to Florida. Under strikingly similar circumstances, the Supreme Court has held that the forum state did not have the right to deprive a defendant of a contractual provision limiting the time within which suit could be brought. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 282 U.S. 143, reh. den., 292 U.S. 607.

In the Delta & Pine Land case, the contract concerned a fidelity bond by which the defendant, a Connecticut corporation, qualified to do business in Mississippi and Tennessee, had insured the plaintiff, a Mississippi corporation with its principal office in Tennessee, against loss resulting from dishonesty of its employees "in any position anywhere." The policy listed twenty-one employees who were then working in Mississippi.[7] The contract, however, was negotiated and executed in Tennessee. It contained a condition that any claim under the contract had to be made within fifteen months from the termination of the suretyship agreement. One of the employees whose acts were insured against committed defalcations in Mississippi and the insured sued the indemnitor in that state. A Mississippi statute stated that all contracts of insurance on property, lives or interests in Mississippi were deemed made in that state; another stated that the Mississippi statutory periods of limitations of actions could not be altered by private agreements. The Mississippi court, applying these statutes, struck down the aforementioned contractual condition and allowed recovery on the contract despite the plaintiff's

7. *Watson* v. *Employers Liability Co.*, 348 U.S. 66, 77.

failure to make claim within the fifteen-month period. The Supreme Court reversed in a unanimous decision.

The following language from the Supreme Court's opinion sets forth precisely the principles we must follow and the decision we must make in the present case:

> "It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Co. v. Dick, supra, p. 408), it may not on grounds of policy ignore a right which has lawfully vested elsewhere if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made.

> A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Ins. Co. v. Dunken, supra; Home Insurance Co. v. Dick, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond v. Hume, 243 U.S. 15, 22. But clearly this is not such a case." 292 U.S. at 149, 150.

In accordance with the foregoing, we hold that the provision in the subject insurance policy which limits the time in which suit can be brought is a substantial property right which is protected by the Fourteenth Amendment to the Constitution, and under the circumstances of this case a violation of due process would result from the application of Florida Statute 95.03 to this provision.

As the Supreme Court observed in the Delta & Pine Land case, our conclusion that it would violate due process renders unnecessary a consideration of whether it would violate the full faith and credit or the contract clauses of the federal constitution. Extensive research, however, among the decisions of the Supreme Court and the lower federal and state courts relating to control of interstate relations by the due process and full faith and credit clauses discloses that the Dick and Delta & Pine Land decisions have been cited many times and have never been called into question or limited by later decisions of the Supreme Court. See e.g., *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 71, 76-78; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590, 591; *Order of Travelers* v. *Wolfe*, 331 U.S. 549, 608, 628; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 211; cf.

Hanson v. *Deckla*, 357 U.S. 235, 254; *Hoopeston Co.* v. *Cullen*, 318 U.S. 313.

The cited cases form part of a larger body of law which has as a basic premise the principle that only where a state has significant interests involved may it impair property rights created in other states. See, e. g., *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 209-11. A secondary principle which is also of significance here is that even though the affected interests of the state may be substantial enough to justify its refusal to give affirmative help in enforcing a foreign contract which it finds obnoxious, these interests may, on the other hand, be insufficient to justify the state's rewriting the contract, enlarging the obligation of the makers and enforcing it in a manner contrary to their undertaking. *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 76 (concurring opinion); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149, 150; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408-10; see also *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D. Fla., 54 F. Supp. 145.

Following the principles set out above, we hold that the district court erred in failing to sustain the appellant's defense to this suit.

The judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the appellant.

RIVES, Circuit Judge, Dissenting:

The Legislature of the State of Florida has enacted that, "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . ., at a

period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." Florida Statutes Annotated, §95.03. The language of that statute seems to me to leave no room for construction; it applies to "any contract whatever."

No one has attacked the validity of that statute as applied to contracts made in Florida, or can reasonably do so. Stipulations shortening the period of limitation result in the same evils and abuses whether entered into in the State of Florida or outside that State. I cannot agree that the Florida Legislature, or the courts of that State, must accord to such a stipulation contained in an ambulatory contract of insurance held by a Florida resident, but entered into in Illinois, any greater sanctity than they would accord to such a stipulation made in Florida. I think that the Florida Legislature can protect residents of that State against the application in Florida courts of stipulations shortening the period of limitation in contracts performed in Florida regardless of the place where the contracts are executed. I therefore respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, United States Court of Appeals, Fifth Circuit

By Clara R. James
Deputy

New Orleans, Louisiana
August 12, 1959
(Seal)

Judgment.

Extract from the Minutes of April 8, 1959.

No. 17,525.

SUN INSURANCE OFFICE LIMITED,

versus.

JOHN CLAY.

This cause came on to be heard on the transcript of the Record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in favor of the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

Order Denying Petitions for Rehearing.

Extract from the Minutes of May 28, 1959.

No. 17,525.

SUN INSURANCE OFFICE LIMITED,

versus.

JOHN CLAY.

It is ordered by the Court that the petitions for rehearing filed in the above styled numbered cause be, and the same are hereby Denied. "Rives, Circuit Judge, dissenting.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 470

JOHN CLAY, *Petitioner*,

v.

SUN INSURANCE OFFICE, LIMITED, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

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No. 470

JOHN CLAY,

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v.

SUN INSURANCE OFFICE, LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Opinion of the Court Below and Prior Opinions in This Case

1. The judgment sought to be reviewed herein was entered by the Court of Appeals for the Fifth Circuit on June 19, 1963. The Court's opinion, *Sun Ins. Office, Ltd.* v. *Clay*, 319 F. 2d 505, is reprinted in Appendix C of the Petition, pp. A1-A14.

2. The prior opinions in this case are as follows:

(a) Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 8, 1959, *Sun Ins. Office, Ltd.* v. *Clay*, 265 F. 2d 522, which is reprinted in Appendix E of the Petition, pp. A17-A27.

(b) Opinion of the United States Supreme Court dated June 13, 1960, *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207.

(c) Opinion of the Supreme Court of Florida, dated October 18, 1961, *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735.

The Question Presented for Review

Where an insurer, in Illinois, issues and delivers to a resident of Illinois a personal property floater insurance policy containing a suit clause limiting the time to sue which is legal under the law of Illinois and thereafter the assured changes his residence to Florida where he sustains a loss under the policy, may the insurer under the Constitution be deprived of its defense based on the suit clause by the application of a Florida statute which prohibits such limitations in general terms not specifically applicable to foreign contracts of insurance?

Constitutional Provisions and Statutes Involved

1. The provisions of the United States Constitution involved in this case are as follows:

(a) The due process clause of the Fourteenth Amendment which provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(b) Article 1, Section 10, which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

(c) Article IV, Section 1, which provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

2. The Florida statute involved is Fla. Stat., § 95.03 (1957), which is set forth in Appendix A of the Petition, p. A1.

Statement of the Case *

The text of the clause which is sought to be invalidated reads as follows:

> "Suit Clause: No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state *within which this Policy is issued* such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein." (Pl. Ex. 1, R. 10) (Emphasis added.)

The facts material to the constitutional issue, which is the sole issue presented in this case, are as follows:

The Respondent, a British company doing business in various States, including Illinois and Florida (Pl. Ex. 1, R. 13) issued a policy of insurance to Petitioner on April 22, 1952 for a term of three years through its local Illinois agents. When the policy was issued, the Assured was a citizen of Illinois, and the policy specified the address in Chicago, Illinois where he resided (Pl. Ex. 1, R. 8). The entire premium for the full term of the policy was paid in Chicago (R. 60). Furs, jewelry and paintings covered by the policy were appraised by Chicago dealers (Pl. Ex. 1, R. 11, 12). The policy in bold type is designated as an Illinois form of policy covering risks on personal property throughout the world as follows:

---

* Record references are to the Transcript of Record, United States Court of Appeals for the Fifth Circuit.

ILLINOIS
PERSONAL PROPERTY FLOATER POLICY
(World Wide).

A personal property floater is an inland marine policy governed by the Illinois Insurance Code, Ill. Rev. Stat., ch. 73, § 616, Class 3(d) (1957). The form of the policy, as well as the rate to be applied, must be filed with and approved by the Director of Insurance of Illinois (Ill. Rev. Stat., ch. 73, §§ 755(2), 1065.22 (1957)) and no company may issue a policy or charge a rate therefor except in accord with such approved filings under penalty of law (Ill. Rev. Stat., ch. 73, §§ 1065.23, 1065.34 (1957)). The Illinois form issued to the Assured herein contained the one year limitation clause set forth above.

Some time after the policy was issued, the Assured changed his residence to Florida where the losses claimed thereunder occurred in the latter part of December, 1954 and in January, 1955. Petitioner notified Respondent of the loss on February 1, 1955 (R. 54). Respondent denied liability on April 6, 1955 (R. 55). Suit on the policy was instituted in the United States District Court for the Southern District of Florida on May 20, 1957 (R. 2) more than two years after discovery of the losses.

The defense asserted by Respondent which is material to the issue presented here was as follows:

> That the policy sued on provides that no suit for the recovery of any claim shall be sustainable unless commenced within twelve months next after discovery by the assured of the occurrence which gives rise to the claim, and that plaintiff's suit on May 20, 1957, was brought approximately two years and four months after he had full knowledge of his loss.

Petitioner's suit in the District Court was tried before a jury which found for Petitioner in the amount of $6,800 (R. 14), and judgment was entered for that sum (R. 14-15). Respondent moved for judgment *non obstante veredicto* based, *inter alia*, on its defense under the twelve month suit

clause. This motion was denied by the District Court without opinion, apparently on the basis that Fla. Stat., § 95.03 rendered the clause void. On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the District Court was reversed and judgment was entered in favor of Respondent on April 8, 1959 (*Sun Ins. Office, Ltd.* v. *Clay*, 265 F. 2d 522). The Court of Appeals held that it would not undertake the "difficult guess" as to whether under the law of Florida, Section 95.03 applied to the foreign contract of insurance since even if the Florida invalidating statute were held to apply, such application would be invalid under the Fourteenth Amendment as a deprivation of Respondent's property rights. In view of its holding of unconstitutionality which barred a recovery by the assured in any event, the court also refrained from passing on another question of state law relating to the coverage of the policy where a loss is caused by the deliberate act of the assured's wife then residing with him.

Certiorari was granted by the Court (361 U. S. 874 (1959)), and, on June 13, 1960, the Court rendered its decision, *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207, holding that the question of the applicability, under Florida law, of Section 95.03 to the contract in issue, as well as the question of policy coverage, should have been settled before the constitutional question was reached. Accordingly, the decision of the Court of Appeals was vacated and the case was remanded with directions that all questions of Florida law be certified to the Supreme Court of Florida for determination by that court pursuant to Fla. Stat., § 25.031 (1957). By opinion, filed October 18, 1961, *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735, the Supreme Court of Florida in answer to the questions of Florida law which were presented to it pursuant to the mandate of the Court, declared that there was coverage under the policy and that under Florida law, Section 95.03 was applicable to the Illinois contract of insurance involved in this case.

All questions of state law having been determined in obedience to the Court's mandate, the United States Court of Appeals, after receiving briefs and hearing argument, again rendered an opinion on the constitutional issue in favor of Respondent. This opinion, dated June 19, 1963, *Sun Ins. Office, Ltd.* v. *Clay*, 319 F. 2d 505, held that under the due process clause of the Constitution, the contacts of Florida were insufficient to justify the deprivation of Respondent's defense based on the Illinois contract.

ARGUMENT

The Court should not exercise its discretion in favor of granting this petition for a writ of certiorari for the reasons which follow.

POINT I

The decision below is no longer premature.

The Court, in its former opinion in this case, (363 U. S. 207 (1960)) remanded the case with the mandate that all other questions be disposed of prior to a decision on the constitutional issue. The mandate has now been carried out and the decision below on the constitutional issue is no longer subject to attack on the ground that it is premature.

POINT II

The decision below is legally correct and is in full accord with applicable decisions of the Court.

The determination of the United States Court of Appeals is based on the correct principle of law and its correct application to the facts in issue. The holding of that court is as follows:

(a) The presence of "significant" contacts is the determinant of constitutional due process. *Watson* v. *Employers*

Liability Assur. Corp., 348 U. S. 66 (1954); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934); *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930).

(b) Under the facts of this case the forum state's contacts are insufficient to warrant depriving the Respondent of its rights under the valid foreign contract.

The Court of Appeals rejected the conclusion that *Watson* v. *Employers Liability Assur. Corp., supra*, required a different holding. The decision thus recognized the distinction between the interest of Louisiana, which sought to enable its residents to bring direct suit against an insurer of the liability of a non-resident who causes injury within the state, and which was expressed by the State of Louisiana in a well formulated statutory policy; and the interest of Florida which lacks a coherent legislative policy with respect to limitations clauses affecting the various kinds of insurance risks, both foreign and domestic. The decision below holds that the rule of *Home Ins. Co.* v. *Dick, supra*, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra*, has not been overruled or modified. It states that *Watson* did not overrule *Delta & Pine* but distinguished it on its facts by noting that in the latter case "the activities of Mississippi, the state of the forum, in connection with the policy were so slight and so casual that Mississippi could not apply its own law in such a way as to enlarge the obligations of a contract validly created under the law of another state" (319 F. 2d at pp. 511-12). In applying the governing rule to the case at issue, the Court of Appeals correctly held that "the local contacts of Florida * * * are certainly no more, and in our view *are less*, than in the Delta & Pine case" (319 F. 2d at p. 512) (Emphasis added).

The Court of Appeals was correct in finding that Florida's interest in the case at issue was "less" than that of Mississippi in *Delta & Pine*. The Mississippi statute was specifically made applicable to insurance and declared

that it was the policy of the State to apply the statute to extraterritorial contracts governing risks within the State. Whether or not a different result may possibly be reached today in a case involving a similar Mississippi statute, the case at issue does not present a justifiable situation for reversing *Delta & Pine*, since the Florida statute involved herein lacks an affirmative expression of local policy. See *Hanson* v. *Denckla*, 375 U. S. 235, 252 (1958); *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 612 (1947).

The absence of a sufficient expression of policy on the part of Florida to warrant outlawing short periods of limitation in foreign contracts of insurance is further demonstrated by the lack of a coherent statutory pattern in Florida with respect to suit clauses in insurance policies. Thus, Florida, by authority of its Insurance Commissioner adopted a one year suit clause in fire policies effective March 1, 1944. The Spectator, *Insurance Laws, Taxes & Fees*, p. 247 (1959); Appendix, p. 15. On the other hand, a five year limitation period would apply to the all-risks policy in issue under Florida's general statute of limitations (Fla. Stat., § 95.11(3) (1957)) if the one year suit clause is invalidated. No matter how advanced a court may be in its application of the Holmes-Brandeis doctrine that a legislature should be untrammeled by substantive due process in its legislative experimentation in the area of public welfare, the case at issue does not present a situation where the liberal view of the due process clause is apposite. Here, we are dealing with an undifferentiated blunderbuss statute enacted in 1913 at a time when regulation of insurance was in its infancy and personal property floaters were rare. Unlike the statutes involved in *Watson, Osborne* v. *Ozlin*, 310 U. S. 53 (1940); *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943); *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U. S. 532 (1935); and *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957), the Statute here was adopted without regard to any policy considerations in this area of economic activity.

The validity of the decision below is also supported by the rule that a more substantial interest on the part of the forum state is required in a due process case than in a mere choice of law case. Goodrich, *Conflict of Laws*, p. 22 (3d ed. 1949), which states:

> "It should take an extraordinary case to justify an argument founded upon the public policy of the forum. This is especially true when the foreign law involved is that of another state of the United States and where the public policy of the forum is being urged to defeat a defense available under foreign law."

See also *Home Ins. Co.* v. *Dick*, *supra*, wherein the Court stated with reference to the distinction between a choice of law case and one involving deprivation of a contractual right:

> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked * * *. It expressly prohibits the making of certain contracts." (at 407)

The constitutional principle adopted by the Court of Appeals is also in accord with the views on the constitutional issue expressed by the Florida District Court of Appeals in the recent *Ugalde* case (*Confederation Life Ass'n* v. *Ugalde*, 151 So. 2d 315 (1963)). While the Court of Appeals recognized that the facts in *Ugalde* are dissimilar, it nevertheless did point out that the Florida court in that case applied the "significant contacts rule" in holding Florida law inapplicable to contractually created defenses valid under foreign law. The *Ugalde* opinion cites with approval the constitutional principle set forth in the first Court of Appeals opinion in this case, and in *Delta & Pine*, *supra*.

Another recent Florida decision referred to in the opinion below (*Schluter* v. *Nat'l Union Fire Ins. Co.*, 144 So. 2d 95 (Dist. Ct. App. Fla. 1962)) demonstrates the unfortunate

consequences of the application of Section 95.03 to suit clauses in foreign contracts of insurance. *Schluter* involved a loss under a foreign policy of insurance, issued to a New Jersey resident, covering liability for damage to his yacht in inland and coastal waters between Maine and Florida. By affidavit of the yacht owner's captain, the loss was declared to have occurred in Atlantic waters off the coast of Florida. Although the assured was a non-resident at the time of the loss as well as at the time the policy was issued, the suit clause contained in the valid New Jersey contract was voided by the application of Section 95.03. The court stated that it was bound by the answers given by the Florida Supreme Court in this case (133 So. 2d 735 (1961)) as to the application of Section 95.03. In *Schluter*, the constitutional issue was not raised as a bar to such application.

From the *Schluter* case it appears that Section 95.03 is to be applied by the Florida courts to all cases merely where there is jurisdiction regardless of the legitimate policy interest of Florida. The decision of the Court of Appeals in striking down a statute of this type on the basis of the protection afforded by the Constitution of the United States is in accord with the principles of law established in *Watson* and other cases in point and, we submit, furnishes no justifiable occasion for the exercise by the Court of its discretion to review the case in order to overturn the existing applicable principles of law.

POINT III

The decision below is in the public interest.

This conclusion is supported by the following factual considerations:

(a) The one-year suit clause is not a trap for the unwary but represents enlightened insurance regulation com-

pelled by the great majority of states in the administration of their insurance laws. (Appendix, p. 16, quoting N. Y. Ins. Law, § 168(6) and listing states which have adopted one year suit clauses.) The reason for compelling the insertion of one year suit clauses in insurance policies lies in the reserve requirements imposed on insurance companies whereby when a loss claim is asserted, a reserve must be set up until the claim is disposed of (Ill. Rev. Stat., ch. 73, § 1008(1)(1957)). If after the claim is filed, no suit is brought for five, or perhaps fifteen years as some states may permit (Cf. *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S. W. 339 (1917)), the effect on the company's financial condition and on its other policyholders could be disastrous. Excessive premiums would have to be charged to enable a company to maintain the required reserves for such extended periods of time. Consequently, while to the uninitiated a short suit clause might appear as a trick clause inserted for the benefit of the insurer, to those engaged in insurance regulation, the clause has been regarded as a practical necessity, and insurers have been compelled to employ the clause in their approved forms of policy. The policy in issue is on an Illinois form of personal property insurance floater policy and is controlled by the provisions of the Illinois Insurance Code both as to form and as to premiums charged (Ill. Rev. Stat., ch. 73 §§ 616, Class 3(d), 755(2), 1065.22, 1065.23, 1065.34).

(b) The decision below results in a "workable rule" with respect to this class of insurance whereby a loss within the coverage of the policy may occur in any jurisdiction throughout the United States and anywhere else in the world. Mr. Justice Black in his dissenting opinion in the prior *Clay* case (363 U. S. 207 at 221), has recognized the need for a "workable rule for this country today" with respect to the regulation of the insurance business which is carried on beyond state lines. Despite the interstate character of the kind of insurance involved in personal

property floater contracts, there is no uniform state insurance statute regulating the form of policy, the premium, or the reserves to be set aside for asserted losses. However, individual states through their regulatory insurance statutes have worked out methods of control so that policies issued to assureds within their borders must conform to their requirements. Such state control is defeated if the provisions in the contract can be set aside by vague legislative precepts in any state where a loss may occur. Thus, in this case, although an Illinois premium rate was charged and the assured received all the benefits of Illinois coverage, nevertheless, as a result of the fortuitous occurrence of a loss in Florida (as was involved in *Schluter*, where the assured was a non-resident or in the instant case, where he migrated to Florida), such assureds are permitted to substitute a limitations clause in their contract which differs from that accorded other assureds who have bound themselves to observe the same contract. For such deviation to be permitted, there should be a strong local policy interest sufficient to outweigh "the workable rule" needed under our federal system as to this class of insurance.

(c) The decision below is in the public interest because this case does not involve an evasion of local regulatory laws such as is involved in the mail order cases wherein a policy is sent in from out of the state to a local assured in order to avoid control by the assured's state. *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957). In this case, the policy was validly issued in Illinois to an Illinois resident and conformed to the law of Illinois in all respects. When the policy in suit was issued, no violation of Florida law occurred, as may be the case in mail order policies. Here, the decision of the Court of Appeals prevents the retroactive application of the Florida law to a contract which was valid in its inception in a situation where there is no legitimate local policy interest affirmatively expressed by the forum state.

POINT IV

Petitioner's objections to the decision below are in error.

(a) The Petition, at page 11, states that the Court of Appeals erroneously relied on *Confederation Life Ass'n* v. *Ugalde, supra.* In fact, the court below recognized that the *Ugalde* case involved a *Home Ins. Co.* v. *Dick* situation where there is neither residence nor the occurrence of loss in the forum state. The Court of Appeals did, however, cite the *Ugalde* case as being a recent pronouncement of the Florida courts upholding the principle announced in *Delta & Pine* and followed by the Court of Appeals in the first *Clay* case (265 F. 2d 522), requiring a justifiable interest on the part of the forum state, and not mere jurisdiction, in order for its invalidating statute to be applied to a defense available under the law of a foreign jurisdiction.

(b) The Petition, at page 7, states that the Court of Appeals disregarded the Florida Supreme Court's findings in this case with respect to the application of the Statute. The Court of Appeals did not disregard the findings of the Florida court but gave such findings an interpretation most clearly in accord with constitutionality by stating that obviously the Florida court must have required something more than mere jurisdiction for the Statute to be given invalidating effect and reached its decision on the basis of the constitutionality of applying the Statute to the facts of this case. The question certified to the Florida Supreme Court did not relate to the question of constitutionality, but only to Florida law.

(c) The Petition, at page 8, criticizes Illinois law as being more lax than the law of Florida and indicates that the insurer tried to forestall Florida law by the insertion of the suit clause. From the discussion above (pp. 8, 10-11) it is apparent that Illinois has the more coherent and integrated set of statutory regulations with respect to suit

clauses than does Florida and that when the policy was issued, the Respondent had no choice but to issue it in Illinois and in accordance with the requirements of the Illinois Insurance Code. It did not "attempt to derive the greatest possible advantage from the more lax laws of Illinois," as asserted by Petitioner.

(d) The Petition, at page 8, overlooks the distinction between "choice of law" cases and the unconstitutional deprivation of a defense. Thus, the Petition cites *Galliher v. State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833 (1907), and other cases which relate to choice of law to be applied rather than to due process requirements involved where a valid contractual right is at issue. This distinction was made clear above by quotations set forth at page 9, *supra*, from Goodrich, *Conflict of Laws*, and *Home Ins. Co. v. Dick*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. One Year Suit Clauses:

SOURCE: CHART OF STANDARD FORMS OF FIRE INSURANCE POLICIES IN USE, CCH INS. L. REP., FIRE & CASUALTY, pp. 2003-06 (1959).

States which have adopted by statute, or by the Insurance Commissioner under authority of statute, the New York standard fire policy requiring a one year suit clause.

Alabama	Kentucky	Oklahoma
Alaska	Louisiana	Oregon
Arizona	Maryland	Pennsylvania
Arkansas	Michigan	Rhode Island
Colorado	Mississippi	South Carolina
Connecticut	Missouri	South Dakota
Delaware	Montana	Tennessee
District of Columbia	Nebraska	Utah
	Nevada	Vermont
Florida	New Hampshire	Virginia
Georgia	New Jersey	Washington
Hawaii	New Mexico	West Virginia
Idaho	New York	Wisconsin
Illinois	North Carolina	Wyoming
Iowa	Ohio	

TOTAL NUMBER:

42 States and the District of Columbia.

NOTE: In a few of the states listed the standard one year suit clause may be rendered void by decisions applying invalidating statutes to contracts issued within the state. The above list is relied upon not as being definitive of the law of any particular state, but as demonstrating that not only Illinois, but the overwhelming majority of states, do not regard the one year suit clause as an evil, but, on the contrary, require its inclusion in fire policies issued in their states.

2. The New York Insurance Law, § 168(6), which makes mandatory the one year suit clause in the New York standard fire policy provides as follows:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

Certificate of Service

The undersigned, attorney for Respondent, certifies that a true and correct copy of the foregoing Brief for the Respondent has been served on Paschal C. Reese, Esq., 209 South Olive Avenue, West Palm Beach, Florida, attorney for Petitioner, by mailing air mail with postage prepaid, this 11th day of October, 1963.

BERT COTTON

Office Supreme Court, U.S.
FILED
FEB 5 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 470

JOHN CLAY,
Petitioner,

vs.

SUN INSURANCE OFFICE, LIMITED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER AFTER GRANTING OF WRIT OF CERTIORARI

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OPINIONS OF THE COURT BELOW

The first opinion of the United States Court of Appeals for the 5th Circuit (R. 26-34) is reported in 265 F.2d 522.

Petition for rehearing filed May 12, 1959 (R. 36-37), and petition of State of Florida as amicus curiae for rehearing filed May 12, 1959 (R. 37-39), was denied by "Minute

entry of order denying petitions for rehearing May 28, 1959." (R. 39).

The opinion of the Supreme Court of Florida in reply to questions certified to the Supreme Court of Florida by the United States District Court for the Southern District of Florida is reported in 133 So.2d 735 (R. 44-55).

The second opinion of the United States Court of Appeals for the 5th Circuit, following the response by the Supreme Court of the State of Florida to questions propounded (R. 56-66) is reported in 319 F.2d 505.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1), and order allowing certiorari dated December 2, 1963.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in the case are as follows:

1. The due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

2. Article I, Section 10, of the Constitution of the United States which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

3. Article IV, Section 1, of the Constitution of the United States which provides as follows:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

The Statute involved in this case is Section 95.03, Florida Statutes 1963, which provides as follows:

"Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Alabama Code 1896, Paragraph 2802. "Any agreement or stipulation verbal or written, whereby the time for the bringing of any action is limited to a time less than that prescribed by law for the bringing of such action is void."

QUESTION PRESENTED FOR REVIEW

"Should a federal court sitting in Florida recognize a 'suit clause' contained in a personal property insurance policy issued in Illinois but under which loss occurred in Florida, the insured at the time of the loss being a resident of the State of Florida? All of the property for which the claim was made having been located in the State of Florida and the insurer being admitted to do business in Florida?"

STATEMENT OF THE CASE

A complaint was filed by the petitioner John Clay against the respondent Sun Insurance Office, Limited, on May 20, 1957, in the United States District Court for the southern district of Florida, Miami division, seeking to recover $13,500.00 claimed in damages for loss of personal property under a personal property floater policy issued to the petitioner by the respondent on April 22, 1952 (R. 1-2). Attached to the complaint is a copy of the insurance policy (R. 3-8). The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties to the suit and the fact that the amount in controversy exceeded, exclusive of interest and cost, the sum of $3,000. Service was had upon the respondent and answer to the complaint was filed June 12, 1957 (R. 9-10). In the answer, by way of affirmative defense, the respondent raised the question of the suit clause contained in the policy (R. 10). The suit was tried before a jury in West Palm Beach, Florida, on June 4, 1958, and a verdict was entered in favor of the petitioner in the sum of $6,000 (R. 11), and final judgment was filed June 4, 1958, in accordance with the verdict of the jury (R. 11). On June 12, 1958, the respondent filed a "Motion for Judgment non obstante veredicto or in the alternative for a new trial" (R. 12-13). Paragraph 7 of the motion dealt with the question presented in this petition (R. 12). The matter was heard by the United States District Court on July 15, 1958, and an order denying the motion and setting a supersedeas bond was entered on the same date (R. 13). Notice of appeal was then filed on August 8, 1958 (R. 14). Thereafter, briefs were filed by the appellant and the appellee in the lower court and the matter was argued before the United States Court of Appeals sitting in Jacksonville,

Florida, on March 11, 1959. On April 8, 1959, the United States Court of Appeals for the 5th Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 26-34). Judgment was entered by the United States Court of Appeals on April 8, 1959 (R. 35). On April 23, 1959, an extension of twenty days was granted for the filing of a motion for rehearing on the part of the plaintiff, John Clay, and the State of Florida as amicus curiae. On May 12, 1959, a petition for rehearing was filed by Clay, the plaintiff (R. 36-37), and by the Attorney General of the State of Florida as amicus curiae (R. 37-39). No opinion was rendered on the order denying rehearing but the Minutes of the Court reveal that the order was denied on May 28, 1959, with Circuit Judge Rives dissenting (R. 39). In the original opinion of the United States Court of Appeals (R. 26-34) and in the order denying rehearing one of the Judges dissented from the majority opinion and considered it advisable to state his personal views.

Following the denial of a rehearing, on the 26th day of August, 1959, petition for writ of certiorari was filed with the Clerk of the Supreme Court of the United States and given the docket No. 349, October Term, 1959. On October 26, 1959, the Honorable Court granted the petition for writ of certiorari and transferred the case to the summary calendar (R. 40). Following the granting of the petition for writ of certiorari, the Attorney General of the State of Florida requested permission to file briefs as amicus curiae on behalf of the State of Florida. The petition of the Attorney General was granted. Various briefs were filed on behalf of the petitioner and the Honorable Court heard oral argument by the attorneys for the petitioner, the respondent, and the Attorney General of the State of Florida as amicus curiae on the 22nd day of March,

1960. Subsequent to the oral argument the Court reversed and remanded the decision of the United States Court of Appeals (*Clay* v. *Sun Insurance Office, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170) with instructions to the Court of Appeals that it certify two questions concerning the case to the Supreme Court of Florida, and in pursuance to the mandate of the Supreme Court the Circuit Court propounded to the Florida Supreme Court the following questions (R. 42-43):

"(1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?"

"(2) Does an all-risks policy of insurance containing the following provision, 'The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,' and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses

from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?"

The Florida Supreme Court amended its Appellate Rules by adopting a rule relating to "Certified Questions from Federal Courts" (*Sun Insurance Office, Limited,* v. *Clay,* Fla., 133 So.2d 735).

Thereafter, the Florida Supreme Court handed down its Opinion on October 18, 1961 (R. 44-55) and answered the propounded questions in the affirmative.

Thereafter, the United States Court of Appeals for the 5th Circuit advised the attorneys for appellant and appellee that it would receive briefs if counsel desired to file briefs. Briefs were filed by the attorney for appellant and attorney for appellee. On October 2, 1962, the case was argued before the United States Court of Appeals for the 5th Circuit in Jacksonville, Florida. On June 19, 1963, the United States Court of Appeals for the 5th Circuit rendered its opinion (R. 56-66), again reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 66).

Following the rendering of the Opinion of June 19, 1963, by the United States Court of Appeals for the 5th Circuit (R. 56-66) a petition for certiorari to the United States Court of Appeals for the 5th Circuit was filed in this court and on December 2, 1963, the honorable court allowed the certiorari, placed the case on the summary calendar as Case No. 470, October Term 1963 (R. 67).

STATEMENT OF FACTS

John Clay, the appellee, purchased the insurance policy under which the claim was made (R. 3-8) through the appellant's agent, Bartholomay & Clarkson of Chicago on April 22, 1952, being then a resident of the State of Illinois (R. 15). In July, 1952, after the purchase of the policy, the appellee moved to Florida and in July or August, purchased real estate known as J-C Ranch (R. 16, R. 21). At the time of his removal to Florida in 1952, he became a resident and citizen and has been continuously since July, 1952, a resident and citizen of Florida (R. 16, R. 17-18). In 1954 he took up residence at the J-C Ranch near Lake Harbor, Florida (R. 18). While residing at J-C Ranch near Lake Harbor, Florida, personal property which belonged to the appellee was stolen (R. 15-16). Some was burned (R. 18), and other property suffered from vandalism (R. 18). Property claimed to have been stolen was removed from the home by appellee's wife (R. 19), and although demand for the return of the articles was made, they were never returned. The appellee was never advised as to where they were and they were never again in his possession nor did he know where they were located at the time of the trial of the case (R. 19). The appellee's clothes were burned (R. 16-18) and a valuable family portrait was deliberately slashed by the appellee's wife (R. 18).

The appellee notified the appellant of the various losses on February 1, 1955 (R. 20). The appellant investigated the claim under reservation of rights and denied liability to the appellee on April 6, 1955 (R. 20). Suit on the policy was filed on May 20, 1957 (R. 1).

ARGUMENT

The case at bar appears in this court for the second time in a peripatetic history that has brought it from the United States District Court for the Southern District of Florida, to the United States District Court of Appeals for the 5th Circuit, to the United States Supreme Court, back to the United States District Court of Appeals for the 5th Circuit for certification of questions of law, to the Supreme Court of Florida, back to the United States District Court of Appeals for the 5th Circuit after the questions propounded had been answered in the affirmative by the Florida Supreme Court, and now back to this court on a second writ of certiorari. The expensive journey has taken more than six years. At the instant stage all issues of law and fact have been thoroughly litigated, with the exception of the resolution of the constitutional problem raised by the affirmative answer given by the Supreme Court of Florida to the question certified to it by the United States District Court of Appeals for the 5th Circuit in accordance with the directions of this court.

The thrust of the affirmative answers and in particular the answer to Question Number 1 given by the Supreme Court of Florida in *Sun Insurance Offices, Limited,* v. *Clay,* Fla., 133 So.2d 735, is to prohibit any court of the state of Florida from giving effect to any contractual stipulation or provision which fixed the time in which suit may be instituted under such contracts as a period of time less than that provided by the comprehensive Statute of the State of Florida, Section 95.11, Florida Statutes 1963, and more particularly in this case, Section 95.11(3) being the Statute of Limitations on written, unsealed instruments (Appendix A).

95.11(3) "WITHIN FIVE YEARS—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal."

Such was the Florida Court's general conclusion on the applicability of Section 95.03, Florida Statutes 1963 (See Constitutional Provisions and Statutes Involved). When that conclusion is applied to the facts of the case at bar, the Courts of Florida, or the Federal District Court sitting in Florida with jurisdiction derived from diversity of citizenship of the litigants, must invalidate that provision of the personal property, world-wide, all risks, floater insurance policy, issued by the Appellant to the Appellee in Illinois, which provided that any suit arising out of said policy must be filed within twelve (12) months from the discovery of the loss of the goods insured.

The determination by the Supreme Court of Florida (*Sun Insurance Offices, Limited*, v. *Clay*, Fla., 133 So.2d 735) fulfills the requirement previously set by the majority opinion of this honorable court when this case first appeared before it. (*Clay* v. *Sun Insurance Offices, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170), wherein the court declared

> "The constitutional issue should have been reached, only if after decision of two non-constitutional questions, decision was compelled."

Accordingly the two non-constitutional questions were decided and the compelling question, indeed the only question, remaining is whether there exists a violation of guarantees of the Federal Constitution resulting from the invaldation of the twelve months' "suit clause" in the subject insurance policy.

Statutes similar to Florida's Section 95.03, Fla. Stat., exist in thirty-one other jurisdictions. Carnahan, Conflict

of Laws and Life Insurance Contracts (1958), Secs. 26 (h), n. 83 and 137. Each in similar spirit, if not letter, expresses a legislative determination that the Courts of the jurisdiction, when called upon to adjudicate relative rights and liabilities arising under contracts, particularly of insurance, will not enforce contractual provisions which deprive the insured from a fair opportunity to seek the benefit of the insurance for which he has already paid. The specific constitutional issue raised in this appeal concerns only the applicability of Florida's statute to a foreign policy of insurance, but in a larger sense, magnified thirty-one times, the issue as decided will affect the legislative and judicial protection that any other jurisdiction of this nation may afford its citizens or good faith litigants who may find themselves in the Courts of those jurisdictions. It has been long recognized that the very nature of the insurance business demands that the insured receive the beneficent protection of the State. As earlier, succinctly stated by one of the sister circuits of this Court, "Legislation regulating insurance falls properly within the exercise of the State Police power." *New England Mutual Life Insurance Co.* v. *Olin*, 114 F.2d 131, at page 137.

In the case at bar, the contract was made and delivered in Illinois. Except for that fact and the additional information that the appellant has been licensed to do business in Illinois (among several other jurisdictions), there are no other effective contacts with the State of Illinois that appear in this case. Soon after the policy became effective, the insured-Appellee became a resident of Florida, moved himself, his family, his home, and indeed the insured property to Florida. The loss to the insured goods occurred while they were located in Florida, and the investigation of the loss was made by the Appellant through the use of Appellant's Florida agents. In addition, Florida contains

the lawsuit. Furthermore, the Appellant is licensed to do business in the State of Florida. The subject policy not only does not specify the law of the State of Illinois to be applicable or controlling, but is entirely silent on the subject, and by definition a "world-wide" policy contemplates performance of the contract anywhere.

In a line of cases beginning with *Home Insurance Company* v. *Dick et al.*, 281 U.S. 397, 50 S. Ct. 338 (1930); *Hartford Accident and Indemnity Co. et al.* v. *Delta and Pine Land Co.*, 292 U.S. 143, 54 S Ct. 634 (1934); *Pink* v. *A. A. A. Highway Express, Inc., et al.*, 314 U.S. 201, 62 S. Ct. 241 (1941), reh. den. 314 U.S. 716, 62 S. Ct. 477 (1942); and culminating with *Watson* v. *Employers Liability Assurance Corporation, Ltd.*, 348 U.S. 66, 75 S. Ct. 166 (1954), reh. den. 348 U.S. 921, 75 S. Ct. 289 (1955), the Courts have dealt, at first only obliquely, with the problem of what law controls when the law of the place where the contract was made conflicts with an honestly expressed and sincerely administered public policy contained in the laws of the forum. None of these cases are on all fours with the case at bar, and probably for that reason, each is important to the solution of this case. For each decision, up to the Watson case, which does deal directly with the exact point here presented, recognized that at some point the forum state, if closely enough associated to the lawsuit and the parties litigating, could subject a foreign contract to the law expressed in an overriding public policy of the forum state. In *Home Insurance Co.* v. *Dick et al.*, the Appellee, the insured, was a Texas resident bringing suit against an insurance company incorporated in Mexico. The only jurisdiction which the Appellee was able to obtain over the Mexican insurance company was in rem by publication and garnishment of the Mexican insurance company's New York reinsurer, which appears as the Ap-

pellant in the reported case. The suit involved an attempt to collect from the insurance company for damage done to plaintiff-Appellee's tug boat in Mexican waters. The policy of insurance was executed in Mexico and expressly restricted the coverage to damage occurring only in Mexican waters. The policy limited the time within which suit on it had to be instituted. A Texas statute declared such provisions contained in contracts void in Texas. An appeal from the Texas Supreme Court put in issue the constitutionality of the Texas statute as applied to a contract provision to the contrary, the contract having been made and performed outside of Texas, and with one of the contracting parties not actually a party to the litigation. The Supreme Court reversed the decision of the Texas Supreme Court and held that the statute as applied to the facts of the case, violated the Constitution, as a taking of private property, i. e., contractual rights and obligations, without due process of law. It is obvious from a mere abstracting of the relevant facts of the Dick case, that distinctions between it and the case at bar exist in almost every relevant detail. But it is for this reason that the case itself is important to the present controversy. Mr. Justice Brandeis, in delivering the opinion of the Court, took great care to point out that the decision reached in the Dick case would not always be the decision to be reached in subsequent cases where the relevant facts were not so clearly against the forum state.

> "A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws." At page 407.

In footnote 5 on page 408 of the report of the Dick case, the Court lists and compares cases that divide on the question of fact whether there were in those cases things done within the forum of which the forum could properly lay hold as the basis of imposing its own protectionist policies. Among these are personal jurisdiction over both the contracting parties, performance of the contract within the forum state, residence of the parties within the forum state, and other such illustrations of possible, commercial contacts with the forum state. In that footnote, the Court concludes its compendium of cases with this remark, "In the absence of any such things, as in this case, the Court was agreed that a state is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there." Again in the reported case, Justice Brandeis, on page 10 makes a similar reference to the distinction between contracts not made but which were to be performed in the state in which the lawsuit is litigated. The opinion concludes with the following dictum, most relevant to the case at bar:

> "We need not consider how far the state may go in imposing restrictions on the conduct of its own residents and of foreign corporations which have received permission to do business within its borders * * *." At page 410.

The Dick decision, therefore, sets forth at least three facts which in combination would permit a forum state to apply its own statutes invalidating stipulations appearing in contracts limiting the forum's Statute of Limitations—(1) that the contract is performed in the forum state, (2) that the contracting party is a resident of the forum state, and (3) that if a corporation be involved as a contracting party and is a foreign corporation, that it is one which has

received permission to do business within the borders of the forum state. Each of these in combination appear in the case at bar.

Some four years after the Dick decision, the Court decided the Delta & Pine Land Co. case, which throughout the instant litigation has been urged by the Appellant as controlling the facts of the case at bar. The facts of the Delta & Pine case, as the facts of the Dick case, are so dissimilar to the instant case as to render the decision useless as precedent; however, the Appellee feels the rationale is persuasive in distinguishing between situations where the forum is insufficiently connected with the contract and instances where the forum is justified in applying its own law. The Delta & Pine case was an action by an insured against a Connecticut fidelity insurer, instituted in the state courts of Mississippi. The defendant's plea, in addition to alleging the policy to have been made in Tennessee, set up as an affirmative defense a clause in it which required the insurer to make demand on the defendant within fifteen months of the termination of the suretyship. A statute of the forum state which declared void contractual attempts to limit to less than the state's requirements the time within which suits could be brought, was applied to nullify the contractual clause. The United States Supreme Court reversed the forum state, holding the application of the Mississippi statute to nullify the contractual provision was a deprivation of due process.

For present purposes, the Delta & Pine case is edifying not because its results are superficially contrary to those urged by the Appellee, but rather because of the differences inherent in the two contractual provisions sought to be nullified by the respective fori states.

In the Delta & Pine case, the contract provision did not operate to shorten the forum's statutory limitation

period (See Appendix B). The demand by insured on insurer within fifteen months of the termination of the suretyship was a true condition precedent necessary before the insurer was rendered contractually liable. Once the condition was complied with by the insured, the contract did not then attempt to speak further on the time within which suit by the insured had to be brought. Therefore, it was assumed by the Court that the condition precedent having been met by timely notice, the statute of limitations of the forum would be unaffected by the contract. In other words, as long as the contract did not attempt to superimpose its mandate on the legislative public policy of the forum, the forum could not constitutionally impose on the contract. The case at bar is decidedly different. The offending contractual provision relates directly to the time within which the Appellee must bring suit. Liability of the insurer is contractually extinguished by noncompliance, and within a period which conflicts with the legislative mandate of forum Florida. As in the Dick case, the Court in Delta & Pine concedes "That ordinarily, a State may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws * * *. Cases may occur in which enforcement of a contract as made outside a State may be so repugnant to its vital interests as to justify enforcement in a different manner." At page 150.

There exists in the case at bar all of the desiderata which the Supreme Court postulated in both the Dick and Delta & Pine cases. Of the two opposing litigants, the insured is a Florida resident, the insured is licensed to do business by the Secretary of State of Florida. The goods insured were at the time of the loss located in Florida and, therefore, the contract was to be performed in Florida. Florida is the forum state. In addition to these myriad,

controlling contacts, the contractual provision attacked by the application of Section 95.03, Fla. Stat., is one which seeks to violate a valid and proper policy determination of the Florida legislature.

> "Every state has authority under the Constitution to establish through both its judicial and its legislative arms, laws which are controlling upon its inhabitants and domestic affairs; when it is demanded in the domestic forum that the operation of these laws be supplanted by the statute of another state, that forum is not bound, apart from the full faith and credit clause, to yield to the demand, and the law of neither case, by its own force determine the choice of law for the other."
>
> *Pink* v. *A. A. A. Highway Express, Inc. et al.*, 314 U.S. 201, 209, 62 S. Ct. 241, 246 (1941).

The application of the above rationale in the Pink case affirmed a Georgia court's refusal to apply New York law to contracts of insurance written in New York in an action by the insurance company brought against Georgia residents in Georgia. Such reasoning is equally applicable to the case at bar where no statute of a sister state, but rather a contractual provision between individuals violates the forum's laws. The Pink holding illustrates the desire of the courts of the various jurisdictions to be free of the hoary restrictions imposed by the ancient theory that a forum state must apply the law of the place where the contract was made. Such a theory applied between jurisdictions as politically and economically integrated as the Constitution requires that the various States be, could only result in inequity, confusion or equal parts of both. Was the forum to look to the substantive or conflict laws of the place of the making? If to the substantive, which procedural law was controlling? If to the conflicts law, what if that law required the application of the law of the

forum so that the result was a seemingly perpetual bouncing back and forth between the two? See Stumberg, Conflict of Laws, 11-12, 228. In contracts insuring persons or chattels completely mobile, in which the terms expressly contemplate coverage regardless of location, was the law of the place where the contract was made to apply indiscriminately? In days where insurance is solicited and purchased by mail, is the fortuitous postmark to be capable of overriding the public policy of a forum honestly attempting to afford its citizens equitable protection against more astute and powerful negotiators?

The ultimate disposition of these oft-posed questions was made by the United States Supreme Court in *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 75 S. Ct. 166 (1954), reh. den. 348 U.S. 921, 75 S. Ct. 289 (1955).

The Watson case, in contradistinction to the Dick, Delta & Pine and Pink cases, presents an underlying factual situation startlingly similar to that of the case at bar, and, more important, an identical constitutional issue. Plaintiff Watson brought suit against the defendant insurer in the Louisiana state court and was removed to the Federal District Court on the basis of diversity of citizenship. The injured Watson invoked a state statute permitting direct legal action against the insurance company prior to any separate determination of the liability of the insured. The application of the statute ran directly in the face of a contractual stipulation in the insurance contract between insured and insurer, which prohibited such direct action prior to a determination of liability. The contract thus put in issue was made in the state of Massachusetts and the insured was an Illinois corporation. The plaintiff's injury occurred in Louisiana. On appeal to the United States Supreme Court seeking to reverse the trial court's

judgment for the defendant, the issue presented was whether the Federal Constitution forbade Louisiana from applying its own law to a contract and compelled the forum to uphold the offending contractual provision by applying the law of Massachusetts (lex contractu) or Illinois (domicile).

The Court reversed the trial court, holding that neither due process nor the full faith and credit clause was violated by application of Louisiana law to invalidate a contractual provision which would have been upheld if Massachusetts had been the situs of the suit.

Justice Black speaking for the Court dealt with due process and full faith and credit respectively in terms which are controlling in the case at bar:

> "As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this court has in a series of cases held that more states than one may seize hold of local activities which are part of multi-state transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states." At page 72.
>
> "That clause (Full Faith and Credit) does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to be formerly executed. Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies." At page 73.

Specific holdings notwithstanding, the appellee has attempted to illustrate that all the cases relevant to the issue presented herein have agreed that a forum state shall not, if sufficient contacts with the case, and determined poli-

cies to protect exist, be forced to overlook those contacts by subordinating its policies to the conflicting laws of a foreign jurisdiction similarly interested in the contract, policy or other res being litigated. Constitutional mandates are not violated if the contacts are adequate.

In the case at bar, the interests of the State of Florida are superior to the interests of any other state because Florida was the place of performance of the contract; it was the place in which the cause of action arose; it was the state of the policyholder's domicile; the insurance company was subject to the regulation of its business by Florida, and finally because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

> "Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in states far away from the place where the contract is made. In this very case, the policy was sold to Clay with knowledge that he could take his property anywhere in the world as he saw fit, without losing the protection of his insurance. In fact, his contract was described on its face as a 'Personal Property Floater Policy (world-wide).' The contract did not even attempt to provide that the law of Illinois would govern when suits were filed anywhere else in the country. Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The company knew this fact. Particularly since the company was licensed to do business in Florida, it must have known it might be sued there, and that Florida courts would feel bound by Florida law." *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170 (1961) (Mr. Justice Black in the dissenting opinion concurred in by the Chief Justice and Justice Douglas).

While the appellee has attempted to deal simultaneously with both constitutional provisions, due process and full faith and credit, as the cases themselves do, it seems relevant here to express the appellee's theory that the latter clause is not invoked by the facts of the case at bar. That clause commands full faith and credit be given only to the "public acts, records, and judicial proceeds" of the foreign state by the forum. The issue would arise in this case only if it had been first determined that the forum could not apply its own statute to the contract because a violation of due process protection would result. In that event, Florida would have to decide the case solely according to the law of Illinois, meaning that a refusal to apply the Illinois law which permits contractual shortenings of limitation periods would result in a failure to pay adequate homage to Illinois' case law. The statement of the circular proposition serves to illustrate the procession of horrors which can be marshalled by strict adherence to the theory that no other law is possible in commercial cases than that of the place where a contract has been made.

In its opinion of June 19, 1963, the United States Court of Appeals for the 5th Circuit (R. 56-66), called attention to the case of *Confederation Life Association* v. *Ugalde*, Fla., 151 So.2d 315, 318. However, in using the Ugalde case as criteria in the case at bar the court again completely ignored the entirely different circumstances prevailing in the two cases. In the Ugalde case the petitioner was not a Florida resident, the policy had been issued in Cuba to a Cuban resident by a Canadian company and if any loss occurred, it occurred in Cuba. Apparently the only excuse for bringing the suit in the Florida court was to attempt to force the payment of the loss in American currency rather than Cuban currency. The court also fails

to differentiate between a life insurance policy issued in Illinois and the case at bar. *Mutual Life Insurance Company of New York* v. *Hess*, 5th Cir. 1947, 161 F.2d 1; *In re-Mutual Life Insurance Company of New York*, 5th Cir. 1951, 188 F.2d 424. The Court of Appeals has in every instance completely disregarded the fact that in the case at bar the parties resided in the State of Florida during practically all of the life of the policy, the property covered by the policy was located in the State of Florida, the parties were citizens of the State of Florida, the loss occurred in the State of Florida, the investigation by the insurance company was made in the State of Florida and the litigation took place in the State of Florida and subject to the laws of the State of Florida. In no other case cited, with the possible exception of the Watson case, is there any similarity whatever between the cases relied upon by the Court of Appeals for the 5th Circuit and the case at bar.

In dealing with the action of the Florida Supreme Court in reference to the referred questions the court seems to take the position that the rules of the Florida Supreme Court were not followed and that in any event if the case had been commenced in the Florida courts the Florida Supreme Court would have had no jurisdiction since according to the United States Court of Appeals the Florida Supreme Court has jurisdiction only in issuance of extraordinary writs. The court fails entirely to take into consideration that the Florida Supreme Court in the Clay case when the questions were referred, required briefs by all parties concerned and in fact changed the court rules so that the Supreme Court could comply with the request of this honorable court. When the questions were propounded in the Clay case the Florida Supreme Court even went to the extreme of requiring briefs on the constitutionality of Section 25.031, Florida Statutes 1961

(1957 and 1959). Rather than accept the decision of the Florida Supreme Court the Court of Appeals seems to take the position that the Florida Supreme Court should have followed the reasoning of the United States Court of Appeals. Furthermore, the Court of Appeals completely disregarded the decision of the Florida District Court of Appeals in following the Florida Supreme Court in the case of *Frederick Schluter, Sr., Appellant,* v. *National Union Fire Insurance Company of Pittsburgh, Pa.*, Florida, 144 So.2d 95. If the Florida Supreme Court had no jurisdiction as implied by the Court of Appeals then its opinion would not have been binding upon nor would have influenced the Florida District Court of Appeals.

The decision of the Florida Supreme Court in the Clay case in answering both questions propounded in the affirmative definitely accepts the responsibility of the State of Florida to enforce its laws for the protection of its residents and their property regardless of the duration of the residency. In cases where Section 95.03, Florida Statutes, has not been applied to contracts performed within the State of Florida there has been either a preemption of the field by the federal law or the contract involved a subject matter peculiarly affected by maritime interests. *Scheibel* v. *Agwilines, Inc.*, C.C.A. (2 Cir. 1946) 156 F.2d 636; *J. B. Effenson Co.* v. *Three Bays Corporation, Ltd.*, C.A. (5 Cir. 1956) 238 F.2d 611, but see *Hoagland* v. *Railway Express Agency*, 75 So.2d 822 (1954).

In neither opinion of the United States Court of Appeals has the court referred to a single case with the possible exception of the Watson case, where a state had the interest that the State of Florida has in the case at bar, and therefore, the right to expect that its laws and the public policy stated in the laws of Florida, will be enforced.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the validity of Section 95.03, Florida Statutes 1963, should be upheld and its application to the circumstances of this case by the United States District Court be confirmed; that the findings of the United States Court of Appeals for the 5th Circuit should be reversed and the case remanded with instructions that the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned of counsel for Petitioner certifies that a true and correct copy of the foregoing Brief of Petitioner After Granting of Writ of Certorari has been served on BERT COTTON, Esq., Attorney for Respondent, 56 Pine Street, New York, N. Y. 10005, by mailing by United States postage prepaid, this 21 day of Jan, 1964.

APPENDIX A

Excerpts from Florida Statutes 1963:

"Section 95.11 Limitations upon actions other than real actions.—Actions other than those for the recovery of real property can only be commenced as follows:

(3) "WITHIN FIVE YEARS—an action upon any contract, obligation or liability founded upon an instrument of writing not under seal."

APPENDIX B

Contract stipulation from Hartford Accident and Indemnity Co. v. Delta Pine Land Company (150 So. 206):

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

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IN THE

Supreme Court of the United States

October Term, 1963

No. 470

JOHN CLAY,

Petitioner,

v.

SUN INSURANCE OFFICE, LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

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No. 470

JOHN CLAY,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

The Opinion of the Court Below and Prior Opinions in This Case

1. The judgment to be reviewed herein was entered by the Court of Appeals for the Fifth Circuit on June 19, 1963 (R. 66). The court's opinion, *Sun Ins. Office, Ltd.* v. *Clay* is reported at 319 F. 2d 505 (R. 56). The Petition for Certiorari was granted by the Court on December 2, 1963 (*Clay* v. *Sun Ins. Office, Ltd.*, 375 U. S. 929 (R. 67)).

2. The prior opinions in this case are as follows:

(a) Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 8, 1959, *Sun Ins. Office, Ltd.* v. *Clay*, 265 F. 2d 522 (R. 26).

(b) Opinion of the United States Supreme Court dated June 13, 1960, *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207.

(c) Opinion of the Supreme Court of Florida, dated October 18, 1961, *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735 (R. 44).

The Question Presented for Review

Where an insurer issues and delivers in Illinois, to a resident of Illinois, a personal property floater insurance policy containing a suit clause limiting the time to sue which is legal under the law of Illinois and thereafter the assured changes his residence to Florida where he sustains a loss under the policy, may the insurer, under the Constitution, be deprived of its defense based on the suit clause by the application of a Florida statute which prohibits such limitations in general terms not specifically applicable to foreign contracts of insurance?

Constitutional Provisions and Statutes Involved

1. The provisions of the United States Constitution involved in this case are as follows:

(a) The due process clause of the Fourteenth Amendment which provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

(b) Article 1, Section 10, which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

(c) Article IV, Section 1, which provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

2. The Florida statute involved is Fla. Stat., § 95.03 (1961), which provides as follows:

> "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

(Fla. Stat., § 95.11(3) (1961) provides for a five year limitation for actions on written contracts not under seal.)

Statement of the Case

The text of the clause which is sought to be invalidated reads as follows:

> "Suit Clause: No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state *within which this Policy is issued* such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein." (Pl. Ex. A,R. 5) (Emphasis added.)

The facts material to the constitutional issue, which is the sole issue presented in this case, are as follows:

The Respondent, a British company doing business in various states, including Illinois and Florida (Pl. Ex. A,

R. 6) issued a policy of insurance to Petitioner on April 22, 1952 for a term of three years expiring April 22, 1955, through its local Illinois agent (Pl. Ex. A, R. 3). When the policy was issued, the Petitioner was a citizen of Illinois (R. 16), and the policy specified the address in Chicago, Illinois where he resided (Pl. Ex. A, R. 3). The entire premium for the full term of the policy was paid in Chicago and the policy was delivered in Chicago (R. 22-23). Furs, jewelry and paintings covered by the policy were appraised by Chicago dealers (Pl. Ex. A, R. 7, 8). The policy in bold type is designated "ILLINOIS PERSONAL PROPERTY FLOATER POLICY" and covers loss occurring anywhere in the world (Pl. Ex. A, R. 3).

A personal property floater policy is an inland marine policy governed by the Illinois Insurance Code, Ill. Rev. Stat., ch. 73, § 616, Class 3(d) (1961). The form of all such policies issued and delivered in Illinois, as well as the rate to be applied, must be filed with and approved by the Director of Insurance of Illinois (Ill. Rev. Stat., ch. 73, §§ 755(2), 1065.22 (1961)). No company may issue and deliver a policy in Illinois on any form, or charge a rate therefor, except in accord with such approved filings under penalty of law (Ill. Rev. Stat., ch. 73, §§ 1065.23, 1065.34 (1961)). Loss reserves are required to be maintained covering all losses as to which a notice of claim is received by the insurer. (Ill. Rev. Stat., ch. 73, § 1008(1) (1961)). The Illinois form issued to the Petitioner herein contained the one year limitation clause set forth above.

After the three year policy was issued and the premium fully paid, the Petitioner came down to Florida by boat and lived on his boat in "different places", including Miami and Fort Lauderdale (R. 17). He thereafter lived temporarily at an [redacted] located in Clewiston, Florida (R. 17). In June, 1954, more than two years after the policy was issued, he moved into a house located on a ranch at Lake Harbor, Florida (R. 15, 17), where in December, 1954 and January,

1955, the losses for which claim is made under the policy occurred (R. 18). The losses consist only of a small portion of the items insured under the policy (R. 3) and there is no evidence as to how much of the property covered by the policy was located in Florida at the time of the loss. A property settlement entered into between Petitioner and his wife shortly thereafter "referred to property outside the State of Florida" (R. 21). Petitioner sent proofs of loss to Respondent's agent in Illinois and the proofs were received by the agent at its office in Chicago, Illinois (R. 2). Respondent denied liability on April 6, 1955 (R. 20). Suit on the policy was instituted in the United States District Court for the Southern District of Florida on May 20, 1957 (R. 1) more than two years after discovery of the losses.

The defense asserted by Respondent which is material to the issue presented here was that the action was not brought within the time limited by the suit clause contained in the policy and was therefore barred.

Petitioner's suit in the District Court was tried before a jury which found for Petitioner in the amount of $5,100 plus attorney's fees assessed against the Respondent amounting to $1,700 (R. 11), and judgment was entered for the total sum (R. 11). Respondent moved for judgment *non obstante veredicto* based, *inter alia*, on its defense under the twelve month suit clause (R. 12). This motion was denied by the District Court without opinion, apparently on the basis that Fla. Stat., § 95.03 rendered the clause void (R. 13). On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the District Court was reversed and judgment was entered in favor of Respondent on April 8, 1959 (*Sun Ins. Office, Ltd.* v. *Clay*, 265 F. 2d 522 (R. 35)).

The Court of Appeals held that it would not undertake to determine whether under the law of Florida, Section 95.03 applied to the foreign contract of insurance since

even if the Florida invalidating statute were held to apply, such application would be invalid under the Fourteenth Amendment as a deprivation of Respondent's property rights. In view of its holding of unconstitutionality which barred a recovery by the assured in any event, the Court of Appeals also refrained from passing on another question of state law relating to the coverage of the policy where a loss is caused by the deliberate act of the assured's wife then residing with him.

Certiorari was granted by the Court (361 U. S. 874 (1959) (R. 40)), and, on June 13, 1960, the Court rendered its decision, *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207, holding that the question of the applicability, under Florida law, of Section 95.03 to the contract in issue, as well as the question of policy coverage, should have been settled before the constitutional question was reached. Accordingly, the decision of the Court of Appeals was vacated and the case was remanded with directions that all questions of Florida law be certified to the Supreme Court of Florida for determination by that court pursuant to Fla. Stat., § 25.031 (1961). By opinion filed October 18, 1961, *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735 (R. 44), the Supreme Court of Florida, in answer to the questions of Florida law which were presented to it pursuant to the mandate of the Court, declared that there was coverage under the policy and that under Florida law, Section 95.03 was applicable to the Illinois contract of insurance involved in this case.

All questions of state law having been determined in obedience to the Court's mandate, the United States Court of Appeals, after receiving briefs and hearing argument, again rendered an opinion on the constitutional issue in favor of Respondent. This opinion, dated June 19, 1963, *Sun Ins. Office, Ltd.* v. *Clay*, 319 F. 2d 505 (R. 56), held that under the due process clause of the Constitution, the contacts of Florida were insufficient to justify the deprivation of Respondent's defense based on the Illinois contract.

A petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was granted by the Court on December 2, 1963 (R. 67).

Summary of Argument

The decision of the Court of Appeals should be sustained because it is supported by the cases decided by the Court. It holds that a clause containing a short limitation period in a personal property floater policy issued in Illinois to a resident of Illinois which is valid under Illinois law may not be voided by a Florida statute of general nature because the insured thereafter moved to Florida and sustained a loss under the policy in that state.

Under the due process clause of the Constitution, a contract valid where made may not be nullified by a statute of the forum unless the statute expresses a strong justifiable policy for the protection of the residents of the state which outweighs the competing interests in preserving the contract.

The Court has never held that a limitation clause in a foreign contract was of such consequence that the statute of the forum state would be permitted to prevail over the contract. On the contrary it has held in all of the cases dealing with suit limitations that the contract provision was to be upheld. *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934); *Order of United Commercial Travelers* v. *Wolfe*, 331 U. S. 586 (1947). In these cases it was found that the policy of the forum state was not strong enough to override the contract.

There are cases where the Court has permitted the forum state to invalidate a foreign contract, but these have all been cases in which the forum state was protecting a special interest of its residents such as a right to sue an insurance company directly where its residents would be

without remedy in its courts (*Watson* v. *Employers Liability Assur. Corp.*, 348 U. S. 66 (1954)), or a right to workmen's compensation benefits for persons injured within the state (*Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493 (1939)).

The test of due process with respect to legislation dealing with internal matters is different from the test to be applied where the statute seeks to invalidate a foreign contract. If Florida wishes to retain its antiquated statute which invalidates contracts made within its borders limiting the time to sue thereon to any period less than five years, that is a matter between the legislature and the people of Florida, but to apply its general invalidating statute to a foreign contract there must be a clearly expressed policy for the protection of its residents sufficiently strong to outweigh the interests in preserving the contract.

Applying the process of weighing competing interests we submit that the contract is not so repugnant to the legitimate interests of Florida as to justify its nullification for the following reasons:

(a) That the contract provision is not objectionable in and of itself is demonstrated by the prevalence of many one year and two year contractual limitations which are permitted or required in businesses regulated by the federal government, such as the shipping industry, the railroad industry and the securities business, and in the prevalence of one year limitations in businesses regulated by the states, such as commercial transactions, which are the subject of the Uniform Commercial Code, and insurance contracts, where the majority of the states make mandatory the use of a standard fire policy containing a one year suit clause.

(b) Considering the interest of Illinois, the state where the contract was entered into by the parties who resided there, we find that the form of the policy was regulated under the Illinois Insurance Code which requires the filing with and approval by the Insurance Department of all

policies issued in that state, and that the insurer was required by the law of that state to issue therein only policies filed with and approved by the Insurance Department. The control by the states of rates and forms of insurance contracts is related to the solvency of insurance companies which must maintain loss reserves with respect to all claims until they have been disposed of and this is part of the reason for the requirement under the insurance codes that suits on insurance policies be instituted within a reasonably short period.

(c) The Florida Insurance Code manifests no policy against short periods of limitation in insurance contracts made within its borders. It has only two provisions on this subject, one respecting disability insurance and another respecting certain life policies, where short limitation clauses are required or permitted. Its Insurance Commissioner adopted for use in Florida the standard fire insurance policy providing for a one year suit clause. Its Insurance Code expressly disclaims interest in forms of policies other than those issued or delivered in Florida. Where Florida does have a strong policy, it makes it clear. For example, with respect to the delivery in Florida of insurance policies by unlicensed companies it has adopted the Unauthorized Insurers Process Act similar to the California statute which was held constitutional in *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957).

(d) The Florida statute in issue, as interpreted by the Florida Supreme Court (133 So. 2d 735), is so broad as to make it apply to any contract made in another state between residents of other states relating to subject matters in other states as long as the court has jurisdiction. While the Florida Supreme Court did not pass on the issue of constitutionality, its interpretation renders the statute clearly unconstitutional. The significance of the decision is that the statute as interpreted by the court makes it apparent that there is no special interest of the residents of Florida to be protected.

(e) In determining whether the Florida statute outweighs competing interests, consideration should be given to the national interest in the uniformity of interpretation and enforcement of contracts. Congress has ceded to the states the power to regulate insurance within their borders but that does not require the acceptance of the principle that a contract valid in one state should be interpreted and enforced in different ways by the various states unless there is a compelling necessity to do so, which is not here present.

POINT I

The decision below should be sustained on the basis of the decided cases.

The Supreme Court of Florida held that the Florida statute (§ 95.03) which voids inconsistent limitations clauses in contracts sued on in Florida is applicable to the contract here in issue which was made in Illinois and is valid in that state. (*Sun Ins. Office, Ltd.* v. *Clay*, 133 S. 2d 735 (1961).) It did not pass upon the constitutionality of the statute.

Following the decision of the Florida Court, the Court of Appeals held that the Florida statute was unconstitutional as applied to the contract in this case on the authority of the principle laid down in *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930) and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), which it regarded as controlling on this issue.

In *Home Ins. Co.* v. *Dick, supra*, the Court held, in a unanimous opinion, that a Texas statute prohibiting contract limitations shorter than two years could not constitutionally be applied to a suit clause in an insurance contract made outside the state between non-residents in a case in which the loss had occurred outside the state.

In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra,* the Court held that a forum statute voiding a similar limitation in an insurance policy could not be constitutionally applied to a contract made in another state where the loss occurred *in the forum state.* There, a Mississippi corporation doing business in Mississippi and Tennessee and then having its principal place of business in Tennessee procured a fidelity bond in Tennessee protecting it against loss resulting from the dishonesty of its employees in any position anywhere. The policy listed twenty-one employees who were then working in Mississippi. The contract, which was executed and delivered in Tennessee provided that any claim had to be made within fifteen months after its termination. One of the employees committed defalcations in Mississippi and the assured, not having complied with the fifteen month limitation provision, sued on the bond in Mississippi to recover its loss. The Mississippi statute provided that a limitation period in an insurance contract covering Mississippi risks which differs from the limitation period prescribed under Mississippi law shall be void and may not be altered by private agreement. The Court sustained the contract in a unanimous decision, stating:

> "A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment * * *." (292 U. S. at 150).

The facts in *Delta & Pine* are similar in all essential respects to the facts in the case in issue: the policy was issued in the foreign state; the assured was a resident of the foreign state at the time of its issuance; and the loss occurred in the forum state. The facts differ, however, in

three respects and these differences establish a lesser interest of Florida in the contract under consideration:

(1) In *Delta & Pine* a portion of the risk was located in the forum state when the policy was issued, whereas here the property was located in Illinois when the policy was issued.

(2) There the assured was a corporation of the forum state and was doing business in both the forum and contract states when the policy was issued, whereas here the assured was a resident and citizen only of Illinois when the policy was issued.

(3) There the statute was a direct expression of the policy of Mississippi in relation to insurance contracts covering risks in Mississippi, whereas here the statute is a part of the general statutes of limitations of Florida and does not expressly apply to insurance contracts, the Florida Insurance Code provisions relating to insurance contracts expressly excluding control by Florida over insurance contracts issued in other states (Fla. Stat., § 627.01001(2) (1961)).

It is these differences which support the view expressed by the Court of Appeals in its last opinion: "The local contacts of Florida, in the case before us, are certainly no more, and in our view are less, than in the Delta & Pine case" (319 F. 2d 505, 512).

Delta & Pine is consistently treated by the courts as a case involving a clause in a contract limiting the right of the insured to bring his action by his failure to comply with a time period clause in the contract similar to a time to sue clause. Petitioner argues that the case is not in point because the clause there in issue involved a failure to give notice of claim within the contract period. We do not believe the distinction is significant. In any event, if the clause were not regarded as in conflict with a statutory limitation for bringing suit, there would be no controversy.

The Mississippi court held that under the law of Mississippi the fifteen months notice clause was a limitation on the right to bring the action and as such was void because in conflict with the Mississippi statute on limitation of actions applicable to insurance companies. The legal issue, therefore, is the same in *Delta & Pine* as in this case.

The principle of *Delta & Pine* was affirmed in *Order of United Commercial Travelers* v. *Wolfe*, 331 U. S. 586 (1947) where the Court sustained a suit limitation clause in a life insurance contract issued by an Ohio fraternal benefit society against attack by a South Dakota invalidating statute. The Court concluded that the public interest in sustaining the contract outweighed the interest of the forum state as expressed in a general invalidating statute similar to the general statute of Florida. The contract was upheld despite the fact that the assured was a resident of South Dakota at the time the contract was entered into and it was issued to him in South Dakota. The Court recognized that there were situations, such as workmen's compensation cases, which involve local interests of more importance than a policy against a limitation clause in a contract where the result should be different. Great emphasis was placed on the principle of uniformity in the enforcement of contracts which would be disturbed if each forum were to assert its own attitude respecting limitation clauses.

In his dissenting opinion in the *Wolfe* case, Mr. Justice Black makes a strong argument against sustaining the limitation on the ground that the contract was issued in South Dakota to a resident of South Dakota where the risk was located at the time of its issuance. This argument does not apply to the present case where the contract was issued in Illinois to a resident of Illinois and the risk was in Illinois at the time of its issuance. Thus under the dissenting opinion of Mr. Justice Black as well as under the majority opinion in the *Wolfe* case, the contract provision in this case would be sustained.

In all of the decisions of the Court where it was sought to invoke a forum statute to nullify a limitations clause in a contract made in another state, the interest of the forum state was held insufficient to abrogate the contract. However it was recognized by the Court in those cases, as stated in *Delta & Pine*, that a contract made in another state would not have to be enforced by the forum state where it was "so repugnant to its vital interests as to justify enforcement in a different manner" (292 U. S. at p. 150). A number of such cases have been so decided by the Court. *Watson* v. *Employers Liability Assur. Corp.*, 348 U. S. 66 (1954); *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493 (1939); *Griffin* v. *McCoach*, 313 U. S. 498 (1941).

In *Watson* v. *Employers Liability Assur. Corp., supra*, the manufacturer of Toni home permanent preparations was insured for liability under a policy delivered in Massachusetts which contained a clause providing that no action shall lie against the insurer unless a judgment is first obtained against the insured. The product was sold throughout the country and the plaintiff, who was injured by its use in Louisiana, sought to sue the manufacturer in that state, but service was contested. The plaintiff then sued the insurance company directly in Louisiana relying upon a Louisiana statute which specifically provided that a direct action may be brought against the liability insurer by a person injured in Louisiana despite the provision of a policy forbidding such direct action. The Court held that the interest of Louisiana in protecting those injured within its borders was of sufficient importance to justify the nullification of the foreign contract. In considering the weight of Louisiana's interest in this matter, the Court stated that an injured person in Louisiana may require treatment in the state's hospitals or may need public assistance and that if she were not able to sue the insurer in that state, she would sustain a substantial burden in having to travel to Massachusetts to obtain a remedy.

The Court said that "Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there" (348 U. S. at 72-73).

The Court did not overrule *Delta & Pine* but affirmed the principle there stated. It distinguished that case on the ground that no vital interest of the forum state was involved, stating that: "Mississippi activities in connection with the policy were found to be so 'slight' and so 'casual' that Mississippi could not apply its own law in such way as to enlarge the obligations of the Tennessee contract" (348 U. S. at 71).

The vital interest of the forum state in *Watson* is apparent. The decision in that case represents the culmination of a great number of efforts made by the states to give a remedy to persons injured within their borders. These efforts began with statutes permitting a direct cause of action against the insurer after a judgment against the insured was returned unsatisfied. Such a remedy was effective if the injured party was able to bring an action against the tortfeasor; however where the defendant cannot be found within the state the injured party is relegated to an action in some other jurisdiction, which is cumbersome and expensive. Statutes which permit a direct action against the insurer are designed to meet a problem similar to the evil which gave rise to the non-resident motorist statutes which subject a foreign motorist to the jurisdiction of the state within which he causes the injury. The validity of such statutes was upheld in *Hess* v. *Pawloski*, 274 U. S. 352 (1927). The Louisiana statute in the *Watson* case is an extension of the same principle to deal with the problem of the non-resident who remains outside the state but commits a tort within the state by sending in a product dangerous to its inhabitants. The effect of these statutes is not to impose a liability on the insurer which it did not already have. They make it possible for residents of the

state to seek redress within the state by proceeding directly against the insurer upon whom the liability would in any event ultimately fall. They differ substantially from a situation where the forum state attempts to revitalize a contract on which suit has been barred by the running of the limitation period agreed upon by the parties.

Pacific Employers Ins. Co. v. *Industrial Accident Commisssion, supra,* involved the application of a California statute which afforded a remedy under the California Workmen's Compensation Law to an employee injured in California contrary to the provision of a contract requiring the application of Massachusetts law. Here, too, the Court recognized the interest of California in protecting employees who are injured in California and who have hospital bills to pay there as justifying the application of the California statute despite the fact that the employment contract was made in Massachusetts. The Court followed the principle of workmen's compensation cases in recognizing the interest of a state in affording a remedy to an injured employee who might otherwise become a public charge. In accord: *Alaska Packers Ass'n* v. *Industrial Accident Commission,* 294 U. S. 532 (1935) and *Carroll* v. *Lanza,* 349 U. S. 408 (1955).

Griffin v. *McCoach,* 313 U. S. 498 (1941) involved a policy issued and delivered in New York to an insured who was a resident of Texas, naming as beneficiaries persons who were creditors of the assured at the time, but who later ceased to be creditors. Under the law of New York, such persons have a continued insurable interest in the contract, whereas, under the law of Texas, a beneficiary must have an insurable interest at the time of death in order to recover the insurance proceeds. The Court held that Texas was not required to respect the contract if it was obnoxious to its policy to protect its residents against the assumed dangers of insurance on their lives held by strangers.

In the field of insurance the courts have consistently upheld state legislation regulating the insurance business in the state against the objection that the states were exercising extra-territorial power, on the ground that the state may protect the welfare of the insuring public within its borders (*Osborn* v. *Ozlin*, 310 U. S. 53 (1940); *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943)). These cases are cited by the courts as upholding the interest of the state in protecting its residents and there can be no quarrel with the principles for which they stand. But they are not relevant to the issue as to whether a forum state may abrogate a contract valid in another state.

Nor are the choice of law cases relevant, where the issue is whether the statute of limitations of the forum or the place where the contract was made should be applied. Those cases deal with remedies whereas here the invalidating statute of the forum affects a substantive contractual right. The Alabama Supreme Court in *Galliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833 (1907) failed to see this distinction but it was emphasized by Mr. Justice Brandeis in *Home Ins. Co.* v. *Dick* (281 U. S. at 407).

Summarizing the established law on this subject we begin with the general principle that a valid contract is entitled to enforcement in all states; that for a state to abrogate a foreign contract is, except in special circumstances, a denial of due process of law; that in a special class of cases a state will be permitted to abrogate a foreign contract where it is repugnant to the state's declared policy in protecting an important interest of its residents; that in each such case the interest of the state will be weighed against the interest in preserving the contract and the forum state will prevail only where its interests are clearly superior.

The application of the principle of weighing competing interests requires the evaluation not only of the elements of the private transaction of the parties (such as where the

contract was issued, where the parties resided, where the risk was located, etc.) but also of the elements bearing on the competing public interests. In this case the weighing process requires a consideration of the economic factors surrounding the regulation of the insurance business generally and the laws enacted for that purpose which are discussed below.

POINT II

The decision below should be sustained as a matter of policy because the interests of the forum state are not sufficient to outweigh competing interests.

The elements of the private transaction of the parties are as follows: The three year contract of insurance was issued and delivered in Illinois; the insured was a resident of Illinois at the time; the entire premium was paid in Illinois; the property was located in Illinois when the contract was issued; thereafter the insured acquired a residence in Florida and the property which was lost or damaged was located in Florida at the time of its loss or damage; such property consisted only of a small portion of the total personal property covered by the policy and there is no evidence as to whether at the time of the loss other property covered by the policy was in Florida or Illinois or in other states; the insured filed his proof of loss in Illinois.

We turn now to a consideration of the competing public interests and consider:

(a) The general interest in short periods of limitation.

(b) The interest of Illinois in the contract as manifested by its insurance statutes.

(c) The interest of Florida in the contract as manifested by its insurance statutes.

(d) The interest of Florida in the contract as manifested by the invalidating statute.

(e) The national interest in the uniformity of insurance regulation.

(a) The General Interest in Short Periods of Limitation.

At the outset it is important to remove any prejudice against contracts or statutes which require litigation to be instituted within a definite period. There are reasons of public policy for suit limitations as is evidenced by the existence of state and federal statutes which provide for shorter and longer periods to bring actions depending on the nature of the cause of action. Similarly it is customary in private agreements for the parties to stipulate that litigation thereon must be brought within a limited time. In agreements which are regulated by the federal government and the states, short limitation periods are the custom.

(1) *Federally regulated businesses:*

In the shipping industry, the Shipowners' Limited Liability Act approves contracts containing a one year limitation period for liability actions relating to loss of life or personal injury (46 U. S. C. § 183b(a)). The Carriage of Goods by Sea Act not merely approves a one year suit clause but makes such one year period mandatory in actions for loss or damage to goods (46 U. S. C. § 1303(6)).

In the railroad industry, subject to regulation under the Interstate Commerce Act, a two year period of limitation in actions against railroad carriers is permitted (49 U. S. C. § 20(11)). The same two year limitation period is applied to suits against pipeline carriers (49 U. S. C. § 20(11)). In actions brought by railroad carriers and pipeline carriers for recovery of their charges (49 U. S. C. § 16(3)(a)) or brought against them for recovery of overcharges (49

U. S. C. § 16(3)(c)) a maximum two year limitation period is prescribed.

In the case of motor carriers, also regulated under the Interstate Commerce Act, a two year period of limitation in suits by and against such carriers is permitted (49 U. S. C. § 319).

With respect to the securities business, regulated under the Securities Act of 1933 (15 U. S. C. §§ 77a-77aa) and the Securities Exchange Act (15 U. S. C. §§ 78a-78hh), one year suit provisions are the general rule. For example, in an action to enforce a civil liability against underwriters and against persons signing false registration statements, the limitation prescribed is one year after discovery of the violation or one year after discovery should have been made (15 U. S. C. § 77m). The same one year rule applies to actions to enforce a civil liability based on false statements or on a false prospectus (15 U. S. C. § 77m). In civil actions based on manipulation, there is a mandatory one year limitation after discovery of the facts constituting the violation and all such actions are barred within three years after the violation, whether or not discovered (15 U. S. C. § 78i(e)).

A short limitation period in an insurance contract cannot be regarded as "unconscionable" or "overreaching" when Congress demonstrates a policy in favor of one year and two year limitations in actions brought against business interests dealing with the public such as ship owners, railroads, underwriters and corporations issuing securities.

(2) *State regulated businesses*:

Unlike the 1913 Florida statute in issue here, which prevents the parties to a contract from agreeing to a limitation clause of less than five years, modern state statutes favor short periods of limitation.

The Uniform Securities Act (Blue Sky Law), adopted by a number of states, requires a purchaser of securities to bring an action for damages on the contract of sale within two years from the date of the sale (Uniform Securities

Act, § 41(e)). Florida has adopted a forerunner of the Uniform Act containing the same suit clause (Fla. Stat., § 517.21 (1961)).

The Uniform Commercial Code as drafted by the National Conference of Commissioners on Uniform State Laws and by the American Law Institute, which is the most modern body of law governing major commercial transactions, has a number of limitation provisions applicable to particular transactions as follows: in an action for breach of a contract of sale the parties may limit the time to sue to one year by agreement but they may not enter into an agreement providing for a limitation of more than four years (U. C. C. § 2-725); a claim against a bank for cashing a forged or altered check is barred unless the bank is notified thereof within one year (U. C. C. § 4-406); an action for transferring goods in violation of the bulk sales provisions must be brought within six months after the date of the transfer (U. C. C. § 6-111); a warehouse receipt and a bill of lading may provide for any reasonable period of limitation for bringing suit (U. C. C. §§ 7-204, 7-309). One year suit clauses are reasonable. *M & T. Trust Co.* v. *Export S. S. Co.*, 262 N. Y. 92, 186 N.E. 214, *cert. denied*, 290 U. S. 650 (1933); *Sapinkopf* v. *Cunard S. S. Co.*, 254 N. Y. 111, 172 N. E. 259, *cert. denied*, 282 U. S. 879 (1930)).

Turning to the business involved in this case we find that most states in the United States require fire insurance policies to contain one year suit clauses. It is common knowledge that New York has been the leading state in the development of insurance regulation. Its standard fire insurance policy is embodied in its statute (N. Y. Ins. Law, § 168(6)) which makes mandatory the use of that policy, which contains a one year suit clause, by all companies issuing fire insurance contracts in New York. The suit clause reads as follows:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity * * * unless commenced within twelve months next after inception of the loss."

The New York Standard Fire Insurance Policy, including its mandatory one year suit clause, has been adopted by statute or by action of the Insurance Commissioner in 42 states (CCH Ins. L. Rep., Fire & Casualty, pp. 2003-06 (1959)):

Alabama	Kentucky	Oklahoma
Alaska	Louisiana	Oregon
Arizona	Maryland	Pennsylvania
Arkansas	Michigan	Rhode Island
Colorado	Mississippi	South Carolina
Connecticut	Missouri	South Dakota
Delaware	Montana	Tennessee
D. C.	Nevada	Utah
Florida	New Hampshire	Vermont
Georgia	New Jersey	Virginia
Hawaii	New Mexico	Washington
Idaho	New York	West Virginia
Illinois	North Carolina	Wisconsin
Iowa	Ohio	Wyoming

(The adoption of the policy by the Florida Commissioner is discussed *infra*, p. 27).

Laws which regulate the business of insurance are sustained as being necessary in the public interest and are designed to protect the public against unfair treatment by insurers as well as to protect the solvency of insurers for the benefit of the public. There are reasons for the one year suit clause in the standard policy which are related to the financial condition of insurance companies, their reserves and their premium rates, which are discussed below.

Since the one year suit clause in a policy insuring against fire is regarded by state legislatures and state regulatory bodies as serving the public interest, it is difficult to see how it can be regarded as an evil in a personal property floater policy which also insures against the risk of fire. The

clause serves the same regulatory purpose in both classes of policies as will be shown below.

(b) The Interest of Illinois in the Contract as Manifested by Its Insurance Statutes.

Following the decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944), which held that insurance is interstate commerce when carried on over state lines, Congress enacted the McCarran-Ferguson Insurance Regulation Act, (15 U. S. C. §§ 1011-15) which confirmed the jurisdiction of the states to regulate the insurance business. States which previously did not have rating laws, in which rates were made by rating organizations composed of insurance company members, adopted rating laws as a result of which practically all states in the country soon had laws regulating rates for fire, marine and casualty insurance. Under these laws insurers are required to file with state insurance departments rates and forms of policies to which the rates relate. The policy forms are required to be filed because rates without forms are meaningless since a policy form which is more or less favorable to the insured would carry a higher or lower rate. Under the rating laws no form of policy covered by those laws may be issued unless it is filed with the Insurance Department and approved either in advance of issuance or by non-disapproval within a short period of time. Both Illinois and Florida have such laws. (Ill. Rev. Stat., ch. 73, §§ 1065.1-.35 (1961); Fla. Stat., §§ 627.011-.391 (1961)).

The Illinois Insurance Code (Ill. Rev. Stat., ch. 73 (1961) provides a strict system for the regulation of insurance companies, both domestic and foreign, issuing fire and marine insurance policies within its borders, including the personal property floater. The system of insurance regulation in Illinois, as in the case of almost all other states, is to require the filing of forms and rates with the Director of Insurance (§§ 755(2), 1065.22) and no company

may issue a policy except in accordance with filings approved by the Director of Insurance (§§ 1065.22(8), 1065.23). Rates and forms are generally filed by licensed rating organizations on behalf of groups of insurers (§ 1065.4). An insurer may not depart from such filed forms and rates in favor of any individual policyholder at will, but only under a strict proceeding relating to "deviations" which must be approved by the Director of Insurance (§ 1065.25). Any departure from such filed and approved forms subjects the company to severe penalties such as fines or suspension of license (§ 1065.34).

The constitutional justification for compelling such conformity is the recognition that uncontrolled competition in insurance is bad for the public; supervision over rates and forms is the substitute for free competition. Rates must not be excessive, inadequate or discriminatory (§ 1065.19). To assure conformity with the Code and the protection of the public, it is required that policies be issued only through licensed resident agents (§ 1065.57), and provision is made for policing of the companies by licensed rating organizations which examine the policies to see that they conform to the approved filings by the companies (§ 1065.24). The rating laws cover the type of policy here involved: the personal property floater, which is embraced in the definition of inland marine insurance, (§ 616, Class 3(d); § 1065.20).

The Respondent, therefore, was required by law, in complying with an application by a resident of Illinois for a personal property floater policy, to issue the policy in Illinois, through an Illinois agent, and in strict conformity with the forms filed and approved in that state. The suggestion that the Respondent took advantage of the assured in issuing this form of policy must therefore be rejected.

The personal property floater form issued under the Illinois law provides for suit within twelve months after discovery of the loss. Because of the nature of the risks

involved it is deemed fair to the insured to permit the limitations period to run only from discovery of the loss. Limiting suit to twelve months after such discovery is thus more favorable to the insured than the general rule prevailing in this country with respect to the limitations period in suit clauses in fire policies in which the limitation period runs from the date of the loss.

There is an economic reason behind the one year suit clauses in fire and marine insurance policies which is tied in to the theory of rate making requiring rates to be adequate in the interest of preserving the solvency of insurance companies for the public benefit. Fire and marine insurance companies are required to maintain reserves for losses which have occurred until the claim has been disposed of. The Illinois Insurance Code with respect to the maintenance of loss reserves, which is similar to that of most states, provides as follows:

> *Loss Reserves.* (1) A company of Class 3 [which includes the issuer of personal property floater policies] shall maintain a reserve for unpaid loss claims at least equal to the aggregate estimated amounts due or to become due on account of all losses or claims of which the company has received notice * * *." (Ill. Rev. Stat., ch. 73, § 1008(1) (1961)):

The policy behind loss reserve requirements reflects an acknowledgment by states regulating insurance that there is a sound public necessity for requiring more prompt action by an insurance claimant than is required with respect to ordinary contracts. The reserves which a company is required to maintain constitute a charge on its assets which necessarily has a material effect on its balance sheet. Among the thousands of claims filed against insurers, some are invalid and loss reserves must be maintained for such claims when they are made. When the period for suit expires, the financial statement of the company is adjusted to reduce the loss reserve which has been set up for such

barred claims. If the insurer's liability did not terminate after the passage of some reasonably short period, the mounting accumulation of reserves might affect the company's solvency. Solvency can be preserved either by increasing premium rates or by eliminating loss reserves when claims are not prosecuted within the period of time deemed reasonable, and the general pattern of the insurance regulatory laws favors the alternative of limiting the period for bringing suit.

The contract in this case was issued in Illinois, to a resident of Illinois, covering property in Illinois. Its suit clause is valid and enforceable under the laws of Illinois. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346 (1930); *Hartzell* v. *Maryland Casualty Co.*, 163 Ill. App. 221 (1911); *Radick* v. *Underwriters at Lloyd's, London*, 137 F. 2d 21 (7th Cir. 1943). Due weight should be given to the interest of Illinois in this contract which was issued in accordance with its laws regulating insurance.

(c) The Interest of Florida in the Contract as Manifested by Its Insurance Statutes.

Florida has not manifested a clearly defined policy with respect to suit limitations in insurance contracts. For example, in disability and accidental death policies, the Insurance Code made mandatory a two year suit clause (Fla. Laws 1947, ch. 24087, § 3, Fla. Ins. Laws, § 642.03(n) (1953) (now Fla. Stat., § 627.0515 (1961)) and permits a two year suit clause in a life insurance policy issued by a fraternal benefit society (Fla. Stat., § 632.311 (1961)), but the Insurance Code makes no provision with respect to suit clauses in fire and marine insurance policies, and it has been held by the Florida Supreme Court in this case that the five year general statute would apply to such policies.

Thus Florida's local policy, with respect to limitation periods in insurance contracts, shows no abhorrence for suit clauses shorter than five years, and is contrary to the

generally accepted pattern of limitations in insurance contracts. Most states have the one year clause for fire insurance (*supra*, p. 22), and longer periods of limitations, running from one to six years, for life and accident insurance (Carnahan, *Conflict of Laws & Life Insurance Contracts*, § 137 (2d ed. 1958).*

The failure of Florida to manifest a policy against short limitations in insurance contracts is reflected by the action of its Insurance Commissioner. The Florida Insurance Code confers on the Insurance Commissioner control over policies issued by insurers in that state and provides that no insurer shall issue or use any form disapproved by the Commissioner (Fla. Stat., § 627.01091 (1961)). The Florida Insurance Commissioner, apparently unaware of the view that the five year limitations provision would be applied to fire policies, adopted a regulation in 1944 making mandatory for use in Florida the New York Standard Fire Insurance Policy which contains the one year suit clause (The Spectator, *Insurance Laws, Taxes & Fees*, p. 247 (1959)); *Insurance Department Rulings*—1944, pp. "Florida, 1-2" (Underwriter Printing & Publishing Co., New York).

Florida has also expressed a hands-off policy with respect to insurance contracts issued or delivered outside of the state. As we have seen, the statute which prohibits an insurance company from using a form of policy unless it has been approved by the Commissioner applies only to policies

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* The Brief for Petitioner cites Carnahan (§ 137) for the proposition that the states have adopted prohibitory legislation to forestall the insertion by insurers of short limitations clauses. The author refers only to life insurance contracts and even as to such contracts, he cites statutes in at least eight states approving one year suit clauses and, in many more, approving eighteen month and two year suit clauses (§ 26h, nn. 83, 84). Furthermore, Carnahan does not state that any of the life insurance statutes which run from one to six years, purport to invalidate short suit clauses in other states. On the contrary he cites *Delta & Pine* (§ 138) as governing the application of such clauses.

"delivered or issued for delivery in Florida" (Fla. Stat., § 627.01091(1) (1961)). To make it even clearer the Florida Insurance Code provides that the chapter regulating the form of insurance contracts shall not apply "to contracts not issued for delivery in this state nor delivered in this state" (Fla. Stat., § 627.01001(2) 1961). Further evidence of Florida's lack of interest in contracts issued outside the state is found in the section of the Insurance Code dealing with the requirement for a license to do an insurance business in the state where it is provided that no license shall be required of an insurer for engaging in transactions involving a policy after it is issued covering subjects of insurance "not located in the state at the time of issuance" where the policy was lawfully written or delivered outside the state (Fla. Stat., § 624.0201(2) 1961)).

From the foregoing analysis of the Florida Insurance Code it is manifest that Florida has not demonstrated a policy of abhorrence to short limitations clauses in insurance policies issued in Florida to its residents and, as to insurance policies issued outside the state, it disclaims any interest even where the insured is a resident of the state.

The expression of a deeply felt policy with respect to suit limitations in insurance contracts has been declared to be a test in determining whether the forum state has a sufficient interest to override the contract. That test is not met here. Like Louisiana in the *Watson* case Florida has "an insurance code which comprehensively regulates the business of insurance in all its phases" (348 U. S. 66, 67). But unlike Louisiana in that case, its Insurance Code contains no expression against the contract clause in issue. The invalidating statute, § 95.03, which was adopted in 1913 before there were modern insurance regulatory statutes, is part of Florida's general laws listing statutes of limitation.

Where a strong public policy exists, Florida does not hesitate to demonstrate it. Its Insurance Code contains a

statute similar to the California Unauthorized Insurers Process Act (Cal. Ins. Code, §§ 1610-1620), the validity of which was upheld in *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957). Aligning itself with a number of other states concerned with the problem of residents holding policies delivered to them in the state by unauthorized insurers, the Florida statute contains a firm declaration by the legislature of the nature of its interest and the necessity for providing a method of substituted service by exercising "its power to protect its residents" (Fla. Stat., § 626.0504 (1961)).

The Court has adhered to the view that a state seeking to uphold legislation which might conflict with constitutional guarantees must clearly exhibit a strong and positive policy. In *Hanson* v. *Denckla*, 357 U. S. 235 (1958), the Court distinguished *McGee* v. *Int'l Life Ins. Co.*, *supra*, by pointing out that its decision upholding the California Unauthorized Insurers Process Act had made special note of the interest of California in providing redress for its citizens. The Court said:

> "This case is also different from *McGee* in that there the State had enacted special legislation . . . to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subject to special regulation." (at p. 252).

If Florida wishes to apply its antiquated statute to invalidate contracts made within its borders, there can be no attack against its policy on the grounds of due process. But due process of law as applied to a state statute affecting foreign contracts must meet a sterner test. For the statute to invalidate the contract, it must evidence a strong, justifiable policy of such importance for the protection of the residents of the state that it overrides the private and public interest in sustaining the contract, valid under the law of the foreign state.

(d) The Interest of Florida in the Contract as Manifested by the Invalidation Statute.

The Supreme Court of Florida held that the statute in issue applies to "any contract whatever—foreign or domestic" when the contract is before a court in Florida in a case in which the court has jurisdiction (133 So. 2d 735, 738). We are compelled to accept that interpretation. It is for the Florida Supreme Court to say what Florida's statute means and for this Court to determine whether it is constitutional as applied to this case.

The statute as we are required to accept it condemns itself as unconstitutional. It does not demonstrate any particular interest in the protection of residents of Florida. It applies to any contract made in another state between residents of other states relating to subject matters in other states, as long as the parties are within the jurisdiction of the court. Under the principle of *Watson* and *Delta & Pine*, the statute fails to demonstrate a policy designed to protect local interests which is necessary to override a contract with which it comes into conflict.

The Court of Appeals in its last opinion found the decision of the Florida Supreme Court untenable and could not bring itself to "attribute to the Florida Court a literal meaning to the language it used" (319 F. 2d 505, 510), but the mischief of the opinion lies in its application by others who read it as written. Thus, in *Schluter* v. *Nat'l Union Fire Ins. Co.*, 144 So. 2d 95 (Dist. Ct. App. Fla. 1963), the Florida District Court, feeling itself bound by the pronouncement of the Florida Supreme Court in its *Clay* decision, held Florida's statute 95.03 to be a bar to the assertion of a one year suit clause in a maritime insurance policy issued in New Jersey to a New Jersey resident covering a vessel plying from Eastport, Maine, to Cedar Keys, Florida where the damage occurred while the ship was in Atlantic waters off the Florida coast.

The result of the *Clay* decision by the Florida Supreme Court is to disassociate Florida's local policy interest in abrogating a foreign contract from any concern over the protection of residents of the state. Thus weight cannot be given on the constitutional issue to the protection of Florida's residents as a part of its policy to nullify any suit clause of less than five years.

Perhaps the error in the *Schluter* case is attributable to the failure of the insurance company to raise the constitutional issue as a result of which the case was decided as one involving the issue of conflict of laws. As such it is out of line with the weight of authority in these cases. *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S. W. 339 (1917); *Equitable Life Assur. Soc.* v. *McRee*, 75 Fla. 257, 78 So. 22 (1918); *Mutual Life Ins. Co.* v. *Hess*, 161 F. 2d 1 (5th Cir. 1947).

Where decisions of state courts are clearly incorrect in their application of conflict of laws principles, it is considered wise for the Court to correct such erroneous pronouncements. As stated by Goodrich:

> "It is submitted that it will have a salutary effect for the Supreme Court to continue to take jurisdiction in cases where it feels that a state court has gone badly astray in a Conflict of Laws case. We still find in some state courts a reluctance to give operative effect to any but local rules even where the facts calling the rules into play have occurred elsewhere. It seems a desirable thing for the Supreme Court, which sees the nation as a whole, to correct instances of too shocking or too obstinate provincialism upon the part of the courts of a state. The result should be to create a greater degree of uniformity in the disposition of cases regardless of the fortuitous choice of the forum." (Goodrich, *Conflict of Laws*, p. 32 (3rd ed. 1949)).

(e) The National Interest in Uniformity.

When insurance was held to be commerce (*United States* v. *South-Eastern Underwriters Ass'n, supra*) Congress had the choice of regulating the business or leaving it to the states. It decided to permit continued state regulation (McCarran-Ferguson Insurance Regulation Act, *supra*). Federal regulation would have been uniform. It was recognized that regulation of the insurance business within the states was not uniform. But the concession to multiple regulation does not require the acceptance of the principle that an insurance contract made in one state shall be subject to differences in interpretation and enforcement by a host of other states. It is in the national interest that commerce be free from local regulation which impedes it and does not have a uniform effect (*Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945)). This is particularly important with respect to insurance contracts covering inland marine risks (of which the personal property floater policy is but one example) since such contracts insure products of farm and industry moving by water, truck and rail throughout the country. The enforcement of the insurance contract should not depend on the accident of where the property might be located at the time the loss occurs. That is contrary to the policy of the United States and is not permitted where the commercial transaction is under the control of Congress (*J. B. Effenson Co.* v. *Three Bays Corp.*, 238 F. 2d 611 (5th Cir. 1956)).

The Court has held in *State Bd. of Ins.* v. *Todd Shipyards Corp.* (370 U. S. 43 (1962)) that where an insurance contract is made in one state, another state may not constitutionally regulate that contract by a regulatory tax merely because the insured and the property insured are located in the taxing state. That case involved an attempt to regulate insurance policies made outside of Texas on property located in Texas by imposing a tax on them for the purpose

of discouraging the purchase of insurance in unlicensed companies. The insured was a New York corporation doing business in Texas which procured an insurance policy in New York covering its property in Texas. The contacts between Texas and the insurance transaction were that the property covered was physically located in Texas, the insured was present in Texas and any loss which occurred would have taken place in Texas. The Court said that "these were not sufficient contacts with Texas to justify the tax under the requirements of due process." The contacts of Todd Shipyards with Texas were greater than the contacts of the insured in this case with Florida.

In *J. B. Effenson Co.* v. *Three Bays Corp., supra,* the same statute under consideration in this case, Fla. Stat. § 95.03 was sought to be invoked to nullify a suit clause in a charter party which, by incorporating the terms of the Carriage of Goods by Sea Act (46 U. S. C. § 1303), adopted a one year suit clause. The Act did not govern the transaction because it does not apply to charter parties. It was incorporated by the parties in their contract, which was made in Florida, as a convenient method of defining their rights and liabilities. Thus the issue was whether the Florida statute against suit clauses shorter than 5 years should prevail against the contract. No constitutional question was involved. The case is considered as bearing on the weight to be given to Florida's policy against limited suit clauses in contracts. The Court of Appeals upheld the suit clause against the attack of § 95.03 on the ground that the case involved a maritime matter which was of federal concern and that the federal policy favored one year suit clauses in maritime transactions as shown by the Carriage of Goods by Sea Act. The court said:

> "It was not intended by the framers of the Constitution 'to place the rules and limits of maritime law under the disposal and regulation of the several

States, as that would have defeated the uniformity at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States." (238 F. 2d. at 615).

• • •

"If there be any public policy question presented by this appeal, the question is one of the public policy of the United States rather than the State of Florida. The public policy of the United States may be found in the Acts of Congress and such policy so declared may be applied even though the statute is not directly applicable but only made so by being incorporated by reference • • • No public policy is opposed to the incorporation in a charter party of the provisions of the Carriage of Goods by Sea Act, supra, limiting the time for bringing suit • • •." (238 F. 2d at 616).

A similar result was arrived at in the case of another unsuccessful attempt to invoke Florida's § 95.03 to void a one year suit clause in a steamship transportation ticket covering a trip from Miami to New York where the passenger alleged he was injured while the vessel was in Florida waters. *Scheibel* v. *Agwilines, Inc.*, 156 F. 2d 636 (2d Cir. 1946). Here also the constitutional question was not raised and the case is cited as bearing on the weight to be given to Florida's policy as opposed to the competing interest that there be uniformity in matters of national commerce. In support of this doctrine, the Court of Appeals said:

"That state statutes must yield so that uniformity may prevail in interstate transportation has been recognized by the courts even though there was no federal legislation dealing expressly with suit clause limitations •.• •." (156 F. 2d at 638).

We submit that it is sound public policy to discourage the Balkanization of the United States in relation to commercial transactions involving moving goods and parties who move from state to state or do business in several states.

It is not desirable, except in the case of a specially important local interest, to stop a contract at the state's border and strike out one of its clauses. In the process of weighing the interest of Florida against competing interests, the national interest of uniformity in the interpretation and enforcement of a contract made elsewhere should be placed on the scale.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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Office Supreme Court, U.S.
FILED
MAR 16 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 470.

JOHN CLAY,
Petitioner,

vs.

SUN INSURANCE OFFICE, LIMITED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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Statement of the Case 1

Argument—

While the Respondent has raised two points of argument in preparing its Brief, it appears that both points deal with the same question, that is, the denial of due process of law should the decision of the lower court be reversed and the interest of the state, where the interest of the forum state is clearly superior. In the case at bar, the Supreme Court of the state has declared the interest of the State of Florida clearly superior to the interest of the State of Illinois, and the interest of the forum state should be upheld 2

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Constitutional Provisions and Statutes Involved

The Constitutional Provisions and Statutes are the same as those referred to in Petitioner's Brief after Writ of Certiorari, on page 2.

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REPLY BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

The statement of the case as set out in the Brief of the Petitioner and the Brief of the Respondent is substantially correct, except in the following instances:

In the statement of the case prepared by the Respondent the pleader attempts to inject certain Statutes of the State of Illinois which are not pertinent in this case. These

various Statutes of Illinois are not referred to under the Constitutional Provisions and Statutes involved, nor are they referred to in the Transcript of Record. The pleader further implies that the testimony of Mr. Clay (R. 21) refers to the property under the policies. However, the testimony of Clay (R. 21) denies without contradiction in the records that the property mentioned in the Final Decree of Divorce referred in any way to the property involved in this suit.

ARGUMENT.

POINT 1.

The Respondent has again, as in the past, in various Briefs and in arguments before the Courts, insisted that the questions raised in the case at bar are the same as the questions that were decided in *Home Insurance Company* v. *Dick*, 281 U.S. 397 (1930), and *Hartford Accident and Indemnity Co.* v. *Delta and Pine Land Co.*, 292 U.S. 143 (1934).

The above referred to cases are not controlling in the case at bar. In the Dick case the State of Texas had absolutely no interest in the insurance contract or in the loss which occurred outside of the State of Texas. The Delta and Pine case was not decided upon the applicability of the Mississippi Statute of Limitations, since the Statute of Limitations for the mere bringing of a suit under a contract was not at issue. The question in the Delta and Pine case was purely a matter of procedure. The insured in Delta and Pine failed to comply with the terms of the contract in that notice was not given to the bonding company within 15 months after the loss occurred. It was not a matter of a provision in the contract limiting the time in which to file litigation following the refusal of the insur-

ance company to recognize the claim. In the case at bar it is admitted by the Respondent that proper notice of loss was given to the insurer and the objection of the Respondent is based upon the fact that the suit was not filed within 1 year following the notice by the insuring company that it denied liability under the insurance policy. There is nothing in the Florida law on the question that refers in any way to a limitation on the right of the insurance company to designate a period of time in which the notice of loss shall be given.

In the case of the *Order of United Commercial Travelers* v. *Wolfe*, 331 U.S. 586 (1947), cited by the Respondent, the question was in reference to a life insurance policy issued by a fraternal society, and the Court recognized that since the policy was based upon the Constitution and By-Laws of a fraternal society, subscribed to by the insured, that entirely different conditions existed than where the policy is issued by a commercial company qualified to transact business in the State of the forum.

While the United States Court of Appeals has, on two occasions, in the case at bar, taken the position that the interest of the forum state, that is the State of Florida, was insufficient to abrogate the provision of the contract, we find that the Supreme Court of the State of Florida, and the District Court of the State of Florida, have definitely taken the position that the interest of the State of Florida in the case at bar is superior to the interest of the State of Illinois, and, therefore, the limitations imposed by the State of Florida are applicable. *Sun Insurance Office, Limited*, v. *Clay*, 133 So.2d 735 (R. 44) and *Schluter* v. *National Union Fire Insurance Company*, 144 So.2d 95 (District Court of Appeals, Florida, 1963, 2nd District).

The attorneys for the Respondent attempted to beg the question in the case at bar by referring to the Florida In-

surance Code. Particular attention is called to Florida Statute 627.01001 (paragraph II) (Statutes 1961). This provision of the Florida Code simply defines and sets out what shall be contained in an insurance contract and makes no mention of a change in the Statute of Limitations or in the public policy of the State of Florida as provided under Sections 95.03 and 95.11 (3), 1961. In fact the Florida Insurance Code, Chapter 627 of the Statutes of 1961, refers to the following types of insurance only:

Part III—Life insurance and annuity contracts
Part IV—Industrial life insurance policies
Part V—Group life insurance
Part VI—Disability insurance policies
Part VII—Group, blanket and franchise disability insurance
Part VIII—Credit life and disability insurance
Part IX—Property insurance contracts (fire insurance)
Part X—Casualty insurance contracts
Part XI—Surety insurance contracts
Part XII—Title insurance contracts
Part XIII—Variable annuity contracts

The Respondent seems to have lost sight of the question presented in these proceedings. We find all through the Brief of the Respondent, various statements attributed to the Uniform Commercial Codes, Uniform Security Act (Blue Sky Law), to the New York Standard Fire Insurance policy which has been accepted by the Insurance Commissioner of the State of Florida, under authority of statutory regulations.

However, we call attention of the Court in reference to delegation of legislative powers to Article 2 of the Constitution of the State of Florida:

"The powers of the government of the State of Florida shall be divided into three departments, Legislative, Executive and Judicial; and no person properly belonging to one of the Departments shall exercise any power pertaining to either of the others, except in cases expressly provided for by this Constitution."

Apparently the Respondent is advancing the theory that the State Treasurer of the State of Florida, as Insurance Commissioner, under the Insurance Code of said state, has had delegated to him by the Legislature, powers under which he, as Insurance Commissioner, could legislate the public policy of the State of Florida; and change by executive order the periods of limitations as provided by the Statute of Limitations of the State of Florida; that he has been given power to abrogate laws and Statutes enacted by the Legislature of the State of Florida. The Supreme Court of the State of Florida has, in the case of *Robbins* v. *Webb's Cut Rate Drug Store*, 16 So.2d 121 (1944), definitely denied the right of the Legislature to delegate its powers to an administrative officer.

When the case at bar came before the Supreme Court of the State of Florida, *Sun Insurance Office, Limited*, v. *Clay*; 133 So.2d 735 (R. 44), the Supreme Court definitely affirmed the public policy of the State of Florida in reference to insurance contracts such as are involved in this litigation.

In none of the cases cited as authority for its position by the Respondent, that is the Dick case, Delta and Pine case, and the Wolfe case, has the interest of the forum state been in any way comparable with the interest of the State of Florida, in the case at bar. While the contract was issued in Illinois it was a "personal property floater policy" guaranteeing against loss in any part of the world. Almost immediately after entering into the contract the

parties moved to the State of Florida, and so notified the Agent. The property loss and damage was located in the State of Florida. The insured had been a resident of the State of Florida during almost the entire period of the contract. The investigations were made by the insurance company in the State of Florida by agents employed by the company within the State of Florida, liability was denied in the State of Florida, and jurisdiction of the Florida Courts was never denied by the Respondent in proceedings in the District Court, in the Court of Appeals, nor in the Florida Supreme Court, when the questions were referred to the Florida Supreme Court on directions from this Honorable Court. The only possible connection that the State of Illinois could have with the policy was the fact that the policy was handed to the insured in the State of Illinois, and the premium was paid in the State of Illinois.

CONCLUSION.

It is respectfully submitted that the Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

The undersigned, of counsel for Petitioner, certifies that a true and correct copy of the foregoing Reply Brief of Petitioner has been served on BERT COTTON, Esq., Attorney for Respondent, 56 Pine Street, New York, N. Y. 10005, by mailing by United States mail, airmail postage prepaid, this ..... day of March, 1964.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1963
NO. 470

JOHN CLAY,
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SUN INSURANCE OFFICE LIMITED,
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REPLY BRIEF OF THE STATE OF FLORIDA AMICUS CURIAE

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IN THE

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NO. 470

JOHN CLAY,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF THE STATE OF FLORIDA AMICUS CURIAE

STATEMENT OF THE CASE

This brief is submitted by the State of Florida as Amicus Curiae on the side of Petitioner. Amicus Curiae adopts the statement of the case and statement of facts as appear in Respondent's main brief.

ARGUMENT

THE FLORIDA STATUTE OF LIMITATION VOIDING ALL PROVISIONS "CONTAINED IN ANY CONTRACT WHATEVER" WHICH SHORTEN THE TIME TO SUE ON A CONTRACT CONTAINING SUCH PROVISIONS TO A PERIOD

LESS THAN THAT PROVIDED BY FLORIDA STATUTES OF LIMITATION, APPLIES TO A CONTRACT OF INSURANCE ISSUED IN ILLINOIS TO A CITIZEN OF ILLINOIS WHEN A LOSS COVERED BY SUCH CONTRACT OF INSURANCE OCCURS IN FLORIDA SUBSEQUENT TO THE INSURED BECOMING A FLORIDA RESIDENT.

The Supreme Court of Florida has held that Section 95.03, Florida Statutes, is applicable to void the twelve month "suit clause" in the insurance contract involved in the case at bar.

> "We think it is . . . clear . . . that the Legislature intended the Act (§95.03, Florida Statutes,) to apply to 'any contract whatever'—foreign or domestic—when Florida's contract therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." *Sun Insurance Office, Limited v. Clay,* 133 So. 2d 735 at 738 (1961).

In *Schluter v. National Union Fire Ins. Co. of Pittsburgh,* 144 So. 2d 95 (1962), the facts of which are almost identical to those of the case at bar, the District Court of Appeal of Florida, Second District, construed Section 95.03, Florida Statutes, as being applicable to void a similar "suit clause" in an insurance policy. Said Court found Section 95.03, Florida Statutes, applicable because "the loss in the off-shore Atlantic coastwise waters of Florida

. . . vests in the Florida court jurisdiction to entertain suit on the policy of insurance."

The United States Circuit Court of Appeals, Fifth Circuit, considered the Florida Supreme Court's affirmative response to the certified question with respect to Section 95.03, Florida Statutes. The Fifth Circuit Court of Appeals was concerned whether the Florida Supreme Court found Section 95.03 applicable because "the Florida Court would have jurisdiction of a suit on the policy" or because "the State of Florida had such significant contacts with the factual phases of the litigation as to give it a permanent interest in the control of the governing legal rules." *Sun Insurance Office, Limited v. Clay*, (5 Cir. 1963) 319 F. 2d 505.

As far as the case at bar is concerned, the precise ground of the Florida Supreme Court's decision is merely academic. It contributes nothing to the outcome of the present case. If Secton 95.03, Florida Statutes, was found applicable because the Florida Courts had jurisdiction, then that construction is binding on the Federal Courts.

> ". . . the question whether under Florida law Section 95.03 is applicable to this contract is one on which the state court's determination is controlling." *Clay v. Sun Insurance Office, Limited*, 363 U.S. 207 at 212 (1960).

If, on the other hand, the Florida Supreme Court found Section 95.03, Florida Statutes, applicable because "significant contacts" were present to warrant such application,

then all that remains is to determine whether those contacts are sufficient to validate the application of the Florida law.

When the instant case first came to the attention of this Court, Mr. Justice Black said:

> "Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The company knew this fact. Particularly since the company was licensed to do business in Florida, it must have known it might be sued there and that Florida Courts would feel bound by Florida law."

These "significant contacts" validate Florida's application of Section 95.03, Florida Statutes. It is at this time respectfully submitted that when a court considers "significant contacts" it is, in essence, weighing the question whether a State has a sufficient interest to apply its own law in derrogation of some property right.

It is readily admitted that the contract provision in issue was legal under the Illinois law. It is also admitted, as Respondent so strongly suggests on pages 23 to 26 of his brief, that Illinois has some interest in the contract. But these considerations are not in issue here. On page 29 of Respondent's brief, Section 95.03, Florida Statutes, is characterized as "antiquated." Perhaps Respondent's views would be of interest to the Legislature, but the wisdom of the statute should not concern this Court.

The sole issue involved is whether the interest of the State of Florida is sufficient to justify the application of Section 95.03, Florida Statutes, to invalidate the "suit clause" in the instant contract, and thereby expand the Respondent's period of risk. If the interest of the forum is sufficient, the due process clause does not require states automatically to subordnate their own contract laws to the laws of the other states in which contracts happen to have been executed.

> "Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own policies." *Watson v. Employers Liablity Assurance Corp.*, 345 U.S. 66 at 73 (1954).

Florida presently enjoys the unique position of being one of the leading states in permanent population increase. Persons migrating to Florida intending to become permanent residents of this state undoubtedly bring with them personal property of inestimable value much of which is covered by world-wide personal property floater insurance policies containing provisions similar to those appearing in the policy of insurance giving rise to this case. Persons so situated have a right to look to the State of Florida and its laws for protection against techincal language of insurance contracts which permit the insurer to void the insured's substantive rights under policies of insurance.

As a corollary to such rights, it is the position of the state that in its sovereign capacity it has a responsibility through its legislative, executive and judicial branches of government to assure such persons and their property its

protection by enforcement of all applicable laws, including Section 95.03, Florida Statutes, 1959.

Section 95.03, Florida Statutes, presents a clear and concise legislative pronouncement of the public policy of the State of Florida which should not go unrecognized or held to be inapplicable to the case at bar.

No more cogent interest of a state exists than its responsibility to enforce its laws for the protection of its residents and their property and such protection should attach regardless of the duration of the residency. In those cases where Section 95.03, Florida Statutes, has not been applied to contracts performed within the State of Florida, there has been either a preemption of the field by the Federal law or the contract involved a subject matter peculiarly affected by maritime interests. *Scheibel v. Agwilines, Inc.*, C.C.A. (2 Cir. 1946) 156 F. 2d 636; *J. B. Effenson Co. v. Three Bays Corporation, Ltd.*, C. A. (5 Cir. 1956) 238 F. 2d 611, but see *Hoagland v. Railway Express Agency*, 75 So. 2d 822 (1954).

A complete discussion of the application of a statute of limitation very similar to Section 95.03, Florida Statutes, to an out-of-state contract of insurance and perhaps a case more parallel to this controversy than any other appears in *Asel v. Order of the United Commercial Travelers*, 197 S. W. 2d 639 (1946). The highest court of the State of Missouri held the "commencement of action" limiting provisions in an out-of-state contract of insurance must give way to the public policy as expressed in a state statute, applicable to all contracts, which declared void

contractual provisions either directly or indirectly limiting or intending to limit the time in which any suit or action could be instituted. See also *Hornick v. First Catholic Slovak Union of the United States of America*, 224 P. 486 (1924); *Larson v. Lane*, (9 Cir. 1941) 124 F. 2d 121; *Order of United Commercial Travelers of America v. Meinsen*, (8 Cir. 1942) 131 F. 2d 176; *Trammel v. Brotherhood of Locomotive Firemen and Enginemen*, 253 P. 2d 329 (1953).

In the case at bar the interests of the State of Florida are superior to the interests of any other state because public policy of the State of Florida, reflected by the legislative pronouncement of that policy appearing in Section 95.03, Florida Statutes, is involved; Florida was the place of performance of the contract; it was the place in which the cause of action arose; it was the state of the policyholder's domicile; the insurance company admitted to do business in Florida was subject to regulation of its business by Florida; and finally, contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

CONCLUSION

The application of Section 95.03, Florida Statutes, to invalidate the "suit clause" in the instant contract is not violative of due process. The opinion of the United States Court of Appeals for the Fifth Circuit, dated June 19, 1963, is seriously prejudicial to the interests of the State of Florida in its attempts to regulate insurance on lives and property of citizens of Florida, and should be reversed.

Respectfully submitted,

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APPENDIX

Chapter 6465, Laws of 1913:

"AN ACT to Declare Illegal and Void Stipulations and Provisions in Contracts Fixing the Period of Time in Which Suits May Be Instituted Which Shall Be Less Than the Period of Time Fixed by the Statute of Limitations of This State.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

"Section 1. That all provisions and stipulations contained in any contract whatever entered into after this Act shall become effective, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this State, are hereby declared to be contrary to the public policy of this State, and to be illegal and void.

"Section 2. That no court in this State shall give effect to any provision or stipulation of the character mentioned in Section 1 hereof.

"Section 3. This Act shall take effect upon becoming a law."

Approved May 26, 1913.

CERTIFICATE OF SERVICE

I, James T. Carlisle, Assistant Attorney General of the State of Florida, do hereby certify that I have mailed true copies of this brief and appendix to Bert Cotton, Esquire, Attorney for Respondent, 56 Pine Street, New York, New York 10005; and to Messrs. Herbert T. Gibson and Paschal C. Reese of Gibson, Gibson & Reese, 209 South Olive, West Palm Beach, Florida, Attorneys for Petitioner, this ——— day of ———, 1964.

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